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JAMES H. McKENNEY,

# PETITION FOR CERTIORARI.

# In Supreme Court of the United States.

JOHN M. MACK AND G. B. BOREN,
PLAINTIFFS IN ERROR,

*versus*

JOHN PORTER, DEFENDANT IN ERROR.

PETITION FOR A WRIT OF CERTIORARI TO A JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

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JOHN M. MACK AND G. B. BOREN

*versus*

JOHN PORTER.

PETITION FOR A WRIT OF CERTIORARI TO A JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Your petitioners, John M. Mack and G. B. Boren, represent that they have been aggrieved by a decision and judgment of the United States Circuit Court of Appeals, Fourth Circuit, in the above styled cause, rendered February 4th, 1896, and they pray that the said cause may be removed by writ of certiorari to this court, as is provided by the 6th Section of the Act of March 3, 1891, creating Circuit Courts of Appeals, that the said decision may be reviewed, said judgment reversed and the verdict set aside.

With this petition is filed a certified copy of the record from the United States Circuit Court of Appeals, Fourth Circuit, including the opinion of that court announcing said decision and judgment.

**Statement of Case.**

This controversy arose over the purchase by John M. Mack of 710 shares of stock of the John Porter Company. John Porter claims that the sale took place at Steubenville upon certain terms. Mack and Boren claim that no such sale took place there, but that the sale took place in Wheeling on the day succeeding, on totally different terms.

The record shows that John Porter sold to the John

Porter Company, in which he had at one time owned most of the stock, certain tracts of land. One tract was known as the Eagle Works, and the other as the Ætna Works. At the time of the sale there was on the first named a mortgage lien to Mary A. Stuart for $9,000.00, and on the second a similar lien to one Silver for $5,000.00. To indemnify the company against all loss from those debts he deposited with the company, as collateral security, 150 shares of stock issued by said company, representing to the company at the same time that the two debts amounted to only $9,000.00. See pp. 68 and 69. This was done in May, 1891. Sometime prior to December 1st he had borrowed of Boren several thousand dollars, and had given him as collateral security 150 shares of said stock. Previous to that date he had also borrowed of said Mack several thousand dollars and given a large number of shares of the same issue of stock as collateral security. Previous to that date Mack, finding that Porter could not pay the money, had had the collateral sold. The proceeds did not pay the debt by several thousand dollars, and Mack held against him the unpaid balance. Porter had, previous to that date, borrowed of the Exchange Bank of Wheeling about $41,000.00, and had given to said bank as collateral 710 shares of said stock. The stock held by the bank had not only been deposited with the bank, but had been transferred from Mr. Porter to Mr. Jones as trustee for the bank. See p. 44. Mr. Jones was the bank's cashier. Evidently the transfer had been made so that the bank could easily dispose of the stock. J. N. Vance, president of the bank, stated: "We were very anxious to sell the stock." P. 39. Porter was also anxious to sell the stock, for both he and the bank on Nov. 29, 1891, gave to James M. Porter, a cousin of John Porter, a power of attorney to sell the stock. See p. 29.

The record shows, not as the Circuit Court of Appeals says, that "the defendant, Mack, had made some effort without result to purchase this stock from Vance, who was friendly to Porter and unwilling to sell without his consent, and as Porter had an equity of redemption;" but, as Vance himself states, "I proposed to Mr. Mack to buy this stock. My recollection is that Mr. Mack came to the bank on some business matters, and I had an interview with him there, and proposed to him to buy this stock." See p. 44. Mack a few days afterwards authorized his clerk, a Mr. Lance, to offer the bank $41,000 for the stock. Lance, hearing a few days afterwards that James Porter was trying to sell the stock elsewhere, informed Vance that

he would withdraw the offer "if the stock was hawked about by James Porter." That caused Vance and James Porter to go to Pittsburg to see John Porter about the stock. See p. 39 and 29. After a conference, Vance telegraphed to Mr. Boren and Mr. Lance to meet them at Steubenville. They met there. In the trial court below it was claimed for Porter that at that meeting he, Porter, agreed that Mack might have the 710 shares for $41,000; that Boren might have for $65 per share the 150 shares held as collateral by him, upon condition that Mack would not hold him responsible for the unsatisfied part of the debt due him; and that Mack and Boren would guarantee him that the Porter Company should never proceed against him personally on account of the liens on the lands sold the company, nor for any open account between him and the company. On the other hand, it was insisted by Boren and Mack that no agreement was made at Steubenville; that Boren and Lance declined absolutely to deal on any such terms; that when they parted at the railroad depot of that place John Porter wanted more than $41,000 for the 710 shares, and that Mr. Vance, the bank president, asked Lance, Mack's agent, to meet him at Wheeling the next day to see what could be done to make a sale.

Certain it is, as appears by the record, Lance met Mr. Vance at Wheeling the next morning at his request. See p. 40. Then and there a written agreement was made for the purchase of the 710 shares by Mack for $41,000 upon deferred payments, the stock to be transferred to Mack. Porter's name nowhere appears in the written contract as a party to the transaction. The bank sold them, and Jones, the trustee, endorsed his consent on the contract with the assertion that he held "the said stock for the use and benefit of the bank."

When the Stuart and Silver liens, for $9,000 and about $5,000, respectively, became due, John Porter did not pay them. He was financially unable to pay them. The Porter Company, then and afterwards known as the Mack Manufacturing Company, had to pay them; and, on June 30th, 1892, brought a suit at Steubenville against John Porter for $486.24 on an open account, and for $13,779.74 on said lien debts. In the petition it was stated that the company had as collateral security for the liens 150 shares of stock of said company, and prayed that it might be sold, and other equitable relief. See pp. 47 and 48. In January, 1893, Porter appeared and filed an offset of $100. He made no other defence. He made no effort to obtain an injunction to prevent the company from obtaining judg-

ment; but on February 2nd, 1893, allowed judgment to go for $14,772.27, $400 of which was allowed on the open account. Under order of court the said 150 shares of stock was sold and brought $5,700, which sum, after deduction of certain costs, was credited on said judgment and reduced it to $9,190.63, with interest from February 21st, 1893. See p. 48.

On May 3rd, 1894, the company brought suit in Hancock, W. Va., on said judgment. John Porter accepted service of summons. On July 2nd, 1894, judgment was entered by default for $9,941.20, the sum of $9,190.63 being principal of the former judgment. But a few days before this, on June 25th, 1894, John Porter made his first effort to relieve himself of the obligation to pay off those liens. He filed a bill in the Circuit Court of Hancock county against the company, in which he states for the first time his claim as to the result of the meeting at Steubenville on Dec. 1st, 1891. As the bill prayed for an injunction, John Porter swore that the allegations contained in it were true. The injunction was never granted, and nothing was ever done in the suit. A few days before swearing to the bill, on June 18th, 1894, he had obtained from James M. Porter an affidavit as to what he would state took place at the meeting in Steubenville.

*As Stated in Bill,*
on pp. 51 and 52.

That in consideration of the transfer "to the said Boren and Mack" of 150 shares held by the bank, and "the further consideration of the low price which the plaintiff had at said meeting agreed to sell to Mack" the 710 shares held by the bank, the said Boren and Mack agreed to save him harmless against any claim made against him on account of the Stuart and Silver liens.

That he thereafter assigned and transferred the 150 shares of stock "to the said Boren and Mack."

That when Mack and Boren so undertook to save him harmless "they did so for and on behalf of the company, in its interest, and whilst so engaged in the business of the said company." That the company had full knowledge of the transaction, "assented to and adopted and ratified it" by paying off the liens and by taking the 150 shares and "applying and using the same for its own benefit and purposes."

*As Stated in Affidavit,*
on pp. 32 and 33.

That in consideration of the low price ($41,000) to be given for the 710 shares of stock by Mack, Mack was to surrender a note of John Porter, given for several thousand dollars, and upon which a large balance was due, and Boren and Mack personally guaranteed that John Porter "would never be sued for the amount" owing on the said liens.

That the said 150 shares was to belong to the company.

"That they could not agree to this for said company," but would personally undertake to save Porter harmless.

On August 21, 1894, the Mack Company proceeded by a chancery suit to have the lien of their judgment enforced against the realty of John Porter. On January 22nd, 1895, the property of John Porter was put in the hands of a receiver, but the liens on it were found to be far in excess of its value. See p. 56. In Oct.. 1894, John Porter instituted this action against Boren and Mack in the Circuit Court of Hancock County, West Virginia. On motion of the defendants it was removed to the United States Circuit Court for the District of West Virginia. In April, 1895, a trial was had therein. The declaration filed stated that the result of the Steubenville interview was that "in consideration of the agreement of the plaintiff, then made, that the seventy-one thousand dollars of stock held by the Exchange Bank should be sold to the said John M. Mack for the sum of forty-one thousand dollars, *which sale was then and there accordingly made*, and in further consideration of the agreement of the plaintiff then made the said fifteen (thousand) dollars held by the John Porter Company should belong absolutely to the said company," the defendants agreed "to assume" the said liens and to "pay off and discharge" the same, and that the plaintiff would never be sued for the amounts due on them. See pp. 5 and 6.

Up to the time of the swearing of the jury there had been no representation by either John Porter nor James M. Porter (although both had spoken under oath), that a part of the agreement, and the inducement held out to Boren to make the alleged guaranty, was that he might have the 150 shares held by him as collateral for the price of $65 per share. Nor had either of them up to that time stated that Boren and Mack were to guarantee Porter against any claim for the open account held by the company against Porter. Nor did the declaration contain either of such allegations.

The first witness offered was James M. Porter. Early in his testimony he stated that Boren offered 65 cents on the dollar for 150 shares held by him, but that he and John Porter refused to sell, unless a sale should be made embracing the 710 shares held by the bank and 150 shares held by the Mack company. He also stated that Lance, the agent of Mack, "said he wasn't prepared to deal for anything except what was in the Exchange Bank," &c., &c. "We could not agree, and finally came down stairs. Nobody was present up stairs with Mr. Boren, Mr. Lance and myself." Then he claims that on the way to the depot or at the depot the agreement was made, and defines it as follows:

"And we finally agreed that if Mr. Mack would surrender these notes, whatever they were, and the John Porter Company would pay off these deeds of $14,000 ($9,000 and $5,000), that Mr. Boren could have his stock at 65 cents on the dollar, and they could take what was in the Exchange Bank at $41,000, provided this other arrangement was made. Mr. Boren and Mr. Lance both said, as representatives of the John Porter Company, that they would not make any agreement of that kind; they wasn't there to represent the company, and couldn't do anything of that kind." See pp. 30 and 31.

He follows that statement with this:

"The proposition was made by them like this: That if we would let them have that stock in the Exchange Bank, $71,000, for $41,000, and let Mr. Boren have his stock at 65 cents on the dollar, that they would return these notes in Philadelphia, amounting to several thousand dollars. I don't just remember the amount. That they would agree personally that they would see that John Porter was never sued on these deeds of trnst of $9,000 and $5,000." See p. 31.

Nine months before this witness had made an affidavit as to what was the alleged contract. It is set forth on pages 32 and 33 of the record. In it he makes no mention that a part of the contract was that Boren was to get the $15,000 of stock at 65 cents. On page 34 he says: "I don't know whether Mr. Vance or Mr. Boren agreed to this or not." And on page 35 he says: "Mr. Lance never talked anything but the $41,000. He said that was all he had authority to give, and that was all he would give, and then the matter came up about the Philadelphia matter, and he said that every place, first and last and all the time. $41,000 was all he would talk of—this $41,000."

The next witness who was present at Steubenville, introduced by the defendant in error, was J. N. Vance, president of the Exchange Bank. Vance stated that it was after a conference with John Porter that we telegraphed to Boren and Lance, "that they come and we * * had a conference there together, talking the matter over generally. * * Just what was the matter of difference, or what the request of Mr. Porter was, I never fully understood." "Mr. Lance and Mr. Boren, as I remember, just gave assent to the matter, in a very informal and indefinite manner, to whatever they were talking about. I don't know whether it embraced all the talk or only a portion of it." "My understanding was that Lance and Boren assented to what the other side proposed. I don't know what the terms

were." "I really didn't understand what they consented to, whether it was all or not. It was really (merely) a nod, or something of that nature." "I can't recall what it was I heard." "I can't recall what they were, because I wasn't consulted. What I heard was more in the shape of a listener, an outsider." See pp. 38 and 39. And yet this was the gentleman who had gone from Wheeling to Pittsburg, and from Pittsburg to Steubenville, in order that the bank might not, through Porter's conduct, lose the offer made by Mack at his request.

Mr. Vance denies that any agreement was closed at Steubenville by which John Porter agreed that Mack might have the 710 shares at $41,000. He swore that "60 was the lowest he (Porter) would agree to sell at Steubenville, and that was on conditions," &c. * * "As to how we came to close the thing up the next day, it was with the understanding that Mr. Porter was willing to accept $60 a share for the stock. We got about 57 and a fraction. We got $41,000 for 710 shares. The understanding of Mr. Porter was to accept $60. The bank gave Mr. Porter credit between what was got for the stock and the price he agreed to sell, which amounted to $1,600.00." See p. 39.

Mr. Vance also says that while on the train coming to Steubenville, Porter complained of Mack having sold his stock in Philadelphia, and he "ought to make up to him the difference between the price he had purchased the stock at and the price it was really worth, and that was the grievance he told me of. *I can't recollect of hearing him say anything in relation to mortgages* on the property of the company." See p. 39.

John Porter next testified. He made the following statements:

"We talked about the sale of stock for some little time, and when we arrived at an agreement that *they* were to pay $41,000 for the $71,000 of stock, and were to indemnify me against any deed of trust, or anything the company held against me, and were also to cancel some notes that Mr. Mack held against me, a balance in Philadelphia." See page 46.

Again: "*Mr. Mack* was to get the stock for $41,000. *They* were to get this $71,000 of stock for $41,000. They were to take care of the deeds of trust." *Ibid.*

Again: "*They* offered me $41,000 for the $71,000, and I wouldn't agree to that without *they* would agree to wipe this indebtedness out of the company." See p. 47.

Again: "At that time there was a $15,000 lot of stock

held by the John Porter Company. They were to get that. They were to hold that stock—that is, the John Porter Company." *Ibid.*

It is impossible to tell from John Porter's testimony whether Mack, or Mack and Boren, bought the $71,000 of stock.

There is no intimation in his testimony in chief that, as a part of the transaction, he sold to Boren at 65 cents $15,000 of stock held as collateral by Boren. It is not until under cross-examination, and after his attention has been called to James Porter's evidence, that he says: "It was a part of the condition of my selling my stock that I would let Mack have the $71,000 shares at $41,000, if Boren would give $65 for $15,000 of stock of mine, which he held as collateral security for what I owed him." See page 50.

About nine months previous he had made another statement under oath. In his bill for an injunction he swore that it was agreed "that in consideration of the transfer of the stock of the said The John Porter Company to the said Boren and Mack by the said plaintiff of the par value of $15,000, and in the further consideration of the low price at which the plaintiff had, at said meeting, agreed to sell to said John M. Mack $71,000 worth of stock at par value, of the said The John Porter Company, the said Boren and Mack would indemnify the plaintiff against said liens and encumbrance, and would pay off and discharge the same, and release the plaintiff from all liability therefor, and the said $15,000 of stock should thereupon become the property and stock of the said 'The John Porter Company.'" See page 51.

In the bill he also states that in pursuance of said agreement the plaintiff thereafter assigned and transferred stock of the said John Porter Company at par value of $15,000 to the said Boren and Mack.

In his testimony he says: "The $15,000 of stock which was held as collateral wasn't transferred to Boren and Mack." Page 54.

In his bill he also states, as to the making of the contract, that Mack and Boren "were officers of the same, the said Boren being general manager thereof, and said Mack president; and when they so undertook, as aforesaid, to indemnify and pay, as stated, *they did so for and on behalf of said company*, in its interest, and whilst so engaged in the business of said company." Pages 51 and 52.

In his testimony he swears "Mr. Boren and Mr. Lance

did tell me that they could *not* act on behalf of the company, and were not authorized to act for the company. They told me that at Steubenuille." See p. 53.

The bill further charges: "Of said agreement the said company had full notice, and it afterwards assented to and adopted and ratified it by making payment as aforesaid, and by taking the $15,000 of stock and applying and using the same for its own benefit." Page 52.

In his testimony he introduced a record, showing that in a suit between the John Porter Company and John Porter, brought by said company against Porter, to recover of him the sums paid by said company in paying off said mortgages, the said $15,000 of stock had been sold by a receiver of a court to satisfy in part the judgment against Porter for said sums. See p. 48.

Such was the testimony offered by the plaintiff below. That of Mr. Vance, indefinite, uncertain, and exhibiting a marked facility for forgetting.

That of the two Porters, self-contradictory, uncertain and varying from time to time.

The plaintiff also introduced G. W. Stewart, who was interested in the Stewart lien. He testified that he met John Porter and Boren for the purpose of settling said lien: "We had quite a heated discussion. In the course of remarks I said to Mr. Boren, 'It seems unjust that you should try to avoid payment of our deed of trust after having purchased from John Porter with the understanding that you were to pay this deed of trust;' and Mr. Boren remarked, 'We did, but we are not going to pay a cent more than we can help.'" From the cross-examination it is evident that Stewart was attempting to make the Stewart lien larger than Boren was willing to admit. In the cross-examintion he strengthened the impression, attempted to be created, that by the use of the word "we," Boren meant himself and Mack; that Boren had thereby confessed to him that he and Mack had promised to pay off the lien. See pp. 35 and 36.

James M. Porter was then recalled, and stated that in the presence of O. S. Marshall he had had a conversation with Boren, and had made the same statement of the Steubenville transaction that he had made in this testimony. See p. 36.

O. S. Marshall next testified that he had heard a conversation between Boren and James M. Porter, in which some reference was made to a transaction at Steubenville. But says that he could not recall any of the conversation.

He simply claimed to remember that Boren had not denied what Porter had alleged.

The above were all the witnesses called by the plaintiff, and he declared that he rested.

## Exception No. 1.

During the introduction of the plaintiff's testimony the defendants excepted to ruling of the trial court as to the introduction of a certain piece of testimony. It arose as follows:

The defendants were claiming that no contract had been made at Steubenville, but that the 710 shares had been bought at Wheeling on the day following the meeting at Steubenville. During the cross-examination of Vance there had been introduced the written contract of Dec. 2nd, made at Wheeling between the bank, by Vance, and Mack, by Lance, by which the stock was sold by the bank to Mack for $41,000 upon deferred payments, and by an endorsement, on which Jones claimed that he held the stock for the use and benefit of the bank. The only parties to that sale were the bank, Jones, the trustee, holding the stock, and Mack by Lance. No allusion was made to Porter, nor to any agreement that Porter was to be held harmless as to the Stewart and Silver liens. Such a contract having been proven, the defendants desired to strengthen the effect of the testimony by proving by Vance that the original notes, which were then and there produced, had been prepared for the bank by its attorney. See p. 42. The plaintiff objected to the introduction of that testimony offered by the defendants. The court sustained the objection, and the defendants filed their first exception to the ruling of the court. See p. 44.

When the plaintiff rested, the defendants below moved the court to exclude plaintiff's evidence on the ground that the contract declared on was not the contract which the evidence of the plaintiff tends to prove.

Thereupon counsel for plaintiff below moved the court, and got its consent, to his amending his declaration by inserting after the words "that the said fifteen thousand dollars, held by the said John Porter Company, should belong absolutely to said company, the words "and in further consideration that the plaintiff should sell to the defendant, Boren, should purchase from the plaintiff $15,000 of stock of the said John Porter Company at the price of sixty-five cents on the dollar."

The plaintiff further moved the court, and got its con-

sent, to his amending his declaration by inserting therein, after the words "the said defendants also undertook and agreed to and with the said plaintiff that the note of said plaintiff, held by the said John M. Mack, on which about four thousand dollars remained due, should be cancelled and returned to the plaintiff, the following words: "and the said defendants also undertook and agreed to and with the said plaintiff that an indebtedness of the plaintiff to the said John Porter Company on an open account, the amount of which was not then definitely known, should be cancelled, and that the said defendants would pay off the same, and that the plaintiff should never be sued therefor, but was then and there free from the same."

EXCEPTIONS 2 AND 3.

The defendants, by counsel, then and there objected to said amendments, or either of them, being made, which objections were severally overruled; to each of which rulings and judgments, respectively, the defendants then and there excepted, being their 2nd and 3rd exceptions.

Whereupon the defendants moved for a continuance until another term of the court because said amendments having been made, they were entitled to such continuance.

EXCEPTION 4.

But the last mentioned motion was then and there denied and overruled, to which ruling and judgment the defendants then and there excepted.

The weak and unreliable testimony of the plaintiff was met by the clear and positive statements of the two men who were called by the defendants below, Boren himself, and DeHaven Lance, who represented Mack. They both testified that they never agreed to any such contract; that they refused to do anything, except that each offered certain sums for the certain respective blocks of stock, for which they had already made offers; except, Lance says that he did say to John Porter that he would guarantee that Mr. Mack would never sue him (Porter) on the amount due him (Mack). Their testimony is clear, straightforward and consistent.

The idea of protecting Porter from the Silver and Stewart's debts were so far from Lance's intention that he would not, while in Steubenville, stay up stairs with the Porters. See Lance, pp. 59, 61, Boren, p. 63. Vance says "I was left down in the office, and I think Mr. Lance came down and joined me there." P. 39.

The contract of sale (see p. 40) showed a purchase, not from Porter, but from the bank. This contract was written by the counsel for the bank, under the direction of Mr. Vance, who claimed that he could not have sold the stock in that way except by consent of Porter, *and claimed to be acting under the consent.* Yet not one word was put in the contract showing there was any consideration for the stock except $41,000. The receipt for the cash payment mentioned the amount as "being the first payment for John Porter's stock bought of the Exchange Bank." P. 45.

The defendants below first called Mr. Lance as a witness. After he had stated that in the negotiations for the 710 shares he had his first talk with Mr. Vance at Wheeling, he was asked "at whose solicitation," in order to show that it was Vance who was pressing Mack to buy the stock. The court of its own motion asked, "What is the object of this." The object having been stated, the plaintiff objects. The court, ignoring the fact that the very question at issue was at what place and upon what terms the 710 shares of stock had been bought, and in substance ruling out the defendant's position that he had bought the stock at Wheeling, and at no other place, sustained the objection upon the ground: "What occurred between Mr. Vance and Lance in the commencement of the negotiations for the purchase of this stock, Mr. Lance being the agent of Mr. Mack, can not be admitted as evidence in the absence of Mr. Porter."

EXCEPTION 5.

In its ruling the court thus ignored also all the testimony that Vance did have ample power to represent Porter as far as any such representation was necessary for the sale of the stock. To that ruling the defendants filed their 5th Exception.

Lance states that he went to Steubenville upon a telegram, not from Porter, but from Vance. At Steubenville he went upstairs into the parlor with James M. Porter, who began to talk about the 150 shares held by the Porter or Mack Company as collateral. After listening to him a few minutes he told Porter that that was a matter that he (Lance) had nothing to do with. "It was a matter I did not understand very well, because I knew nothing about the affairs of the company. I wasn't connected in any way as an officer of the company and didn't care to go into it, because I had no authority and no business to go into the affairs of the company. I came there on that

telegram *to see Mr. Vance.* He (Porter) said that was a purchase money mortgage lien against the Eagle and against the Ætna Brick Works. He wanted the liens to be paid out of the collateral stock that was held by the company—this $15,000. I told him I had no business to interfere with the affairs of the company, that I had no authority, and if he had nothing more to say I would go down stairs, and *I immediately went down.* No one else was in the room but James Porter and myself. I went down in the lobby of the hotel and took a seat on the east side of the office and sat there. Mr. Vance was walking up and down the lobby of the hotel, and he came over to me and said: 'Did you fix this matter up.' I said, 'I have nothing to fix up, I came here to see *you*'; and I asked, 'Do you desire to sell that stock or accept my proposition.' * * I did not know where they (the bank) got the stock from. I did not know they held it."

"Mr. Vance and I were alone sitting side by side. He said, 'Wait a while,' and I waited, and we talked about general matters, and we waited there until they got ready to go to the train, and while we were waiting there Mr. John Porter came over and began to talk about Mr. Mack's selling his stock in Philadelphia for a low figure. I told him that Mr. Mack had loaned him money, or had endorsed his paper, and was compelled to pay the money. I told him that Mr. Mack desired nothing but to be fair, and I said to him, 'He will never prosecute you for that difference,' for the difference between the stock as it was sold in Philadelphia and the debt Mr. Porter owed Mr. Mack. He says, 'That is only your say so.' I says, 'Mr. Porter, I will guarantee Mr. Mack will not prosecute you for that difference.'"

Lance states how Porter walked over to where James M. Porter and Boren were talking and stood talking with them, off and on, until he left for the train; and also that he and Vance sat together until he so started. "After I got out on the street Mr. John Porter and Mr. James Porter walked out. Mr. Vance got ready to go, and asked me to go to the train. I objected; I didn't care to go, but he said, 'Come along.' Mr. Vance and I walked together, and the others were ahead some 15 or 20 feet. Mr. Vance and I walked behind. When we got near the depot the train had just pulled in and the bell was ringing to start. Mr. John Porter (Mr. Vance and I stopped at the corner of the depot) came over and said, 'Recollect, Lance, $60 a share for that stock.' I says, 'Mr. Porter, $41,000 for 710 shares of stock, that is all.' That is the last word I had with Mr.

Porter. He had to run to get into the train. * * Mr. Vance said to me, 'Come to Wheeling to-morrow and we will fix this matter up.'"

"Nothing was agreed on in relation to the payment of these two liens that James Porter spoke to me about at Steubenville. At that time I didn't agree to indemnify and save Porter harmless of those liens. I never would talk to *James M. Porter or John Porter* upon the matter." See pp. 59, 60 and 61.

The next witness for the defendants was G. B. Boren, one of the defendants. He also testified that no agreement or contract of any kind was entered into at Steubenville. See pp. 62-3-4. He was asked several questions as to the circumstances under which Mack had sold in Philadelphia the stock he had held as collateral.

The questions were objected to.

EXCEPTIONS 6, 7, 8 AND 9.

The objections were sustained, and exceptions 6, 7, 8 and 9 of the defendants were taken. Those exceptions are not here pressed. The evidence ruled out was offered evidently to remove the impression attempted to be made upon the jury that Mr. Mack had acted unfairly to Mr. John Porter.

EXCEPTION 10.

Boren was then asked about the interview that Stewart had had with him about the Stewart lien; and was asked about the assertion of Stewart that Boren had admitted that he and Mack had agreed to pay off the Stewart and Silver liens. Boren testified that he had never made any such admission; that in the talk about the amount of the lien and paying it off he might have said that "we" are bound to pay it off; that, if he did, he was talking about the company, and not Mack and himself. Thereupon the defendants, to prove that that was his meaning, offered to introduce the notes of a meeting of said company on May 9th, 1891, at which Porter had been present, and at which the company, upon his giving the company his note for $10,000, with 150 shares of the stock of the company as collateral, had agreed to pay off those liens. The plaintiff objected. The Court sustained the objection, and the defendants filed their exception, No. 10.

EXCEPTION 11.

The defendants then offered to prove that the reason

the company had agreed at that meeting to take his note for $10,000, was because John Porter had represented to the company that the Stewart and Silver liens did not amount to "over $9,000." The plaintiff objected, the Court sustained the objection, and the defendants filed their exception, No. 11.

EXCEPTION 12.

Then the counsel for defendants attempted to get in an *oral* statement as to the fact that the company had undertaken to pay off the liens, and proceeded as follows:

"State whether or not the John Porter Company before that meeting in January with Mr. Stewart, in 1892, had assumed to pay off these Stewart and Silver liens?"

This question was objected to by plaintiff's counsel, and the objection was overruled by the Court.

The witness answered: "They had."

Q. "State when and where?"

A. "At the meeting of the directors, May 9th."

Q. "What year?"

A. "1891."

The Court: "You cannot prove this. I will allow to prove the simple fact that before that meeting of Mr. Boren in January with Mr. Stewart, 1892, the John Porter Company had assumed to pay off the Stewart and Silver liens."

Thereupon the defendants excepted to the ruling of the Court and filed their exception No. 12.

EXCEPTION 13.

Upon that being done the Court said, "Then I will exclude it all."

The result of the last ruling being to deprive the defendants of all opportunity of showing that the company had ever promised to pay off the liens, and required them to stand upon a mere statement that the word "we" did not mean themselves. They excepted to the ruling of the Court and filed their exception No. 13.

EXCEPTION 14.

The defendants then attempted to prove by Boren what was said at the meeting, about which Marshall had testified, and at which he alleged that Porter had made a statement about some transaction at Steubenville, and that Boren had not denied it. Boren denied that Porter had made any such statement in that conversation; he then proceeded to state what he had said to John Porter at that

meeting, to the effect that, if he (Porter) did not settle his account, he would sue him before the sun went down.

The plaintiff objected and the court said "that is very improper for you to state, sir. He can tell the purpose he went there for, and that is all the court will permit him to do. This witness can contradict that conversation so far as it is legitimate and pertinent to the issues involved." The defendants being thus deprived of all right to give their version of the conversation spoken of by Marshall and confined to a bare contradiction of the statements which Porter and Marshall had been allowed to make, excepted to the ruling and filed their exception No. 14.

The defendants next called Mr. Mack as a witness. He stated that he lived in Philadelphia, Penn., and that before he purchased the 710 shares of stock, in the latter part of 1891, he was in Wheeling, West Virginia.

EXCEPTION 15.

He was then asked "if you saw Mr. Vance in relation to the stock in the John Porter Company, tell us what transpired." Plaintiff objected to the question. Court said "ask him if there was a conversation between him and Mr. Vance in relation to this stock that Vance held, or rather the bank held, but I do not think you can go into the contents of that conversation which occurred in the absence of Mr. Porter, as binding Mr. Porter." The court sustained the objection and the defendants excepted.

EXCEPTIONS 16 AND 17.

Afterwards the defendants attempted to prove by the witness some details of that conversation to the effect that Vance had asked him to buy the stock, that he had said that he would not have anything to do with it, if John Porter had anything to do with it, and that Vance had assured him that the stock belonged to the bank.

The plaintiff objected. The objections were sustained and the defendants filed their exceptions 16 and 17, respectively.

Thereupon the testimony was closed. The jury rendered a verdict of $10,443.60. A motion for a new trial was made and overruled. One of the grounds for a new trial was that the verdict included damages for the open account of $400, when the declaration did not allege any breach of contract as to that sum. The court overruled that objection, and to that ruling the defendants filed exception No. 18.

An appeal was then taken to the United States Circuit Court of Appeals as above stated. The last named court held that there was no merit in any of the exceptions taken by the defendants.

## Errors Alleged.

Your petitioner insists that the said United States Circuit Court of Appeals erred in not sustaining the above-mentioned exceptions of the defendants, numbered 1, 2, 3, 4, 5, 10, 11, 12, 13, 14, 15, 16, 17 and 18, and in not reversing the judgment of the Circuit Court and granting your petitioners a new trial.

Your petitioners pray that this court will examine into and correct the said errors, and order the said verdict and judgment to be set aside, and that your petitioners shall be awarded a new trial.

## Argument.

We are aware that we cannot expect this court to set aside a verdict because contrary to the evidence. That belonged to the province of the trial court. We have not set forth our full statement of the evidence with any such hope. It was made in order that the court might see that our exceptions are not technical objections made to delay the payment of an honest debt, but reasonable ones forced upon us in our efforts to prevent an unjust verdict. It is a rule of this court to refuse a new trial, even if there have been errors, when upon the whole record it appears that the verdict was a proper one, and hence no real harm done. Our full statement is here made in order that this court might readily see that no such condition of affairs exists in this case; but that on the contrary, should the court sustain your petitioner's exceptions, it would not by setting aside the verdict work any injustice. When a man sues upon a contract of this nature, the burden is on him to prove it by clear and convincing testimony. We have shown by a statement of it how far it is from such class of testimony. In this opinion we are supported by the opinion of the Circuit Court of Appeals. There the judge delivering the opinion said: "The accounts given of this interview and contract are hazy and conflicting, but as it has been passed upon by a jury," &c.. &c. In view of the fact that the verdict in this case was given upon such "hazy and conflicting testimony," your petitioners submit that if the court shall think that there is any reasonable probability that we were injured by any ruling complained of, it will grant us a new trial.

As was said in *Deery* vs. *Clay*, 5 Wall., 796; *Smith* vs. *Shoemaker*, 17 Wall., 639; *Moore* vs. *Nat. Bank*, 104 U. S., 630; *Gilmer* vs. *Higley*, 110, U. S., 50, "When it is sought to apply the rule, that a court of error will not reverse where an error works no injury, it must appear *beyond doubt*, that the error complained of neither did prejudice, nor could have prejudiced, the party against whom the error was made."

Before discussing the errors complained of. it will be well to see how correct an understanding of the evidence the Circuit Court of Appeals had when it rendered its decision overruling our exceptions from the Circuit Court. It first states what Porter contends was the contract made at Steubenville. It then says: "On the part of the defendants, Mack and Boren, it is contended that the negotiations had no other object and had no other result than an agreement that Boren should take the stock held by him at 65 cents on the dollar, and Mack should purchase the stock held by the bank at a figure to be settled between the bank and himself, the bank only stipulating with porter that he should receive forty-one thousand dollars." See p. 100.

Your petitioners submit that the above statement shows an absolute and total misconception of the defence made and the evidence offered by your petitioners. They submit that no other possible misconception of their defence and evidence could have been more injurious to them, or misleading to the court when examining their exceptions to the rulings of the Circuit Court. Your petitioners respectfully submit that it destroyed all possibility of the court's appreciating some of those exceptions, and hence of properly considering them.

It would seem from that statement by the court that your petitioners admitted that there was a "result" had or contract made at Steubenviile, but that they merely differed with Porter as to the terms of it. Yet the record fully and clearly shows that your petitioners strenuously denied that there was any "result" from the Steubenville interview; that Lance and Boren refused to enter into any proposed contract; that when they parted at the depot no contract had been made; that no contract was ever made except the one made at Wheeling *on the next day*, when Lance went there at Vance's request and was informed by Vance that he would accept Mack's offer of $41,000.

Thus it will be seen that, instead of admitting that there was a contract agreed upon in Steubenville, your petitioners made two lines of defence: Ist. That they never entered into any contract at Steubenville. 2nd. That the

only contract that was ever made for the stock was at Wheeling the next day.

It was the failure of the court to understand that these were the defences of your petitioners that caused it to see no merit in your petitioners first exception.

That exception was the ruling of the court that your petitioners should not prove that the Wheeling contract of the following day was written by the bank's agent. It had been proven that Vance first tried to get Mack to buy; that he traveled to Pittsburg to see John Porter about the stock; that he had telegraphed to Lance to come to Steubenville; that he had pretended that Lance had assented by a "nod" to some terms stated by Porter; that he asked Lance to come to Wheeling the next morning. Then it was shown by the defendants that at Wheeling a written contract was entered into, to which John Porter was no party, and appeared to have no interest; in which no consideration was stated but the $41,000; and in which it was stated that the bank sold the stock. That having been proved, the defendants desired to show that this contract, *absolutely ignoring John Porter*, had been drawn, not by Mack's agent, but by the bank's agent, and to receive the benefit of all the legal inferences which would naturally flow from that fact. It would have tended strongly to contradict Vance's intimation or insinuations, that at Steubenville your petitioners agreed that Mack would buy the stock on any terms. It is hardly reasonable to suppose that if Porter had gotten Lance and Boren at Steubenville to agree that Mack should surrender the notes he held against Porter, and that Mack and Boren should protect him against claims amounting to more than $15,000, he would not have insisted upon some writing to prove the agreement; especially as he was at that iime complaining of Mack having treated him badly. Yet the contract for the purchase of the stock when produced contained no such provision. Then it was important to show that such a contract had been drawn with the consent and by the agent of Vance, who was Porter's friend and who had gone to Pittsburg to see Porter before making the sale.

Let it be supposed that there had been a written contract made at Steubenville, would any one dispute the right of either party to prove who wrote it. Here was a contract written at Wheeling, by its terms contradicting not only the plaintiff as to the consideration given for the stock, but showing that Vance, the friend of Porter, who at the trial pretended that Porter only agreed to the sale on terms, was party to a contract for the sale of the stock, when there

was not a word in it alluding to such terms or giving any protection to Porter. Can it be said that it was not important to show that the contract was Vance's creation and statement of the terms upon which Mack bought.

We submit that the Circuit Court of Appeals erred in declaring that it was of "absolutely no consequence," and therefore did not harm us.

The Circuit Court, in ruling out the testimony, put it upon another ground, viz.: that it was of a collateral nature and did "not tend to throw any light on this subject." The Court evidently meant, as will be also seen from others of its ruling, that the only contract under investigation was the alleged one at Steubenville, and that the alleged one at Wheeling had nothing to do with the case.

Your petitioners submit that view was erroneous.

Suppose our defences, viz.: that we made no contract with Porter in Steubenville, and that the only contract we made for the stock was with a bank in Wheeling, were not covered by the plea of non-assumpsit, and that we could have and had set forth them in a special plea, what would have been the result? Would there not have been two contracts at issue? The same effect is produced by the plea of non-assumpsit and the evidence we introduced. Hence, to disprove the Steubenville contract, we were not confined to what took place at Steubenville; we had a perfect right to prove that the only contract we made was at another place and on other terms. A. sues B. upon the claim that B. had bought certain stock of him in the city of C. B. replies, "I did not; I bought the stock in the city of B. from one E., to whom you had sold all your interest." Can anyone doubt but that B. would have a right to prove his defence? Yet here the Circuit Court virtually ruled that all testimony as to what took place in the city of Wheeling was irrelevant, because the plaintiff had alleged that the contract took place in the town of Steubenville. How could it be irrelevant when the defence, if satisfactorily supported by evidence, would have disproved the claim of the plaintiff? It had been proven that we had bought 710 shares of stock which had belonged to Porter. We admitted it, and admitted owing them. Porter claimed we bought them from him on certain terms. It cannot be possible that we were confined to simply denying Porter's claims and testimony. In a criminal trial a thief would be allowed to show where and under what conditions he received the alleged stolen goods. Surely we had the right to show where and under what circumstances we obtained those shares.

There were not one, but two contracts in issue. One alleged by the plaintiff and the other by the defendants. Such being the case, how could the court rule out as not being a part of *res gestae* the acts and words accompanying the Wheeling contract set up by the defendants. Those accompanying the contract alleged by the plaintiff were allowed to be introduced. Upon what principle did the court reject those accompanying the contract stated by the defendants? It had no power to decide which was the true contract. That had become an issue for the jury, the rightful and sole arbiter. Yet the lower court did rule out a material fact, accompanying the making of the contract alleged by us to have been the only contract. It prevented us from showing who prepared the terms of this contract, so different from the alleged Steubenville contract. We also desired to prove that when that contract was being made we insisted that the clause as to the stock being transferred from Jones to the bank should be inserted, because we would have no dealing with Porter. That fact would most materially have tended to disprove the claim of Porter that we not only dealt with him, but agreed to assume for him a burden of some $10,000.

Your petitioners insist that both of the lower courts erred in ruling out the testimony offered. The case of *Bailey* vs. *German-American Bank*, 111 U. S., 216, sustains us in the position that we were not confined to merely denying Porter's claim, but had also the right to prove when and from whom we purchased. In that case the court held that the defendant, in disputing the ownership of certain notes was not obliged to confine himself to one line of defence, but "had a right to prove anything which went to contradict such ownership by showing ownership in Bowen or Allen or any one else."

### Exceptions 2 and 3.

As both of these exceptions apply to amendments to the declaration, and as the amendments are similar in character, we will notice them together. See p. 18.

By the amendments we were affected in two ways:

1st. They enlarged the consideration for the sale of 710 shares of stock.

2nd. They strengthened their case by making it appear for the first time that Boren had some inducement to undertake to guarantee a release to Porter from his liability on the Stewart and Silver debts. It was a ma-

terial change. It varied the contract alleged in the declaration in a material point.

In Chitty Plead., p. 325, 16 Amer. Ed., it is said:

"In stating the consideration, we have seen that it is in all cases absolutely necessary that the whole of the entire consideration for the performance of the act in question should be set forth, and that even where the contract has consisted of several engagements and promises, quite distinct from each other, but founded on one and the same entire consideration, an action cannot be brought for the breach of any one of such engagements or promises, without setting forth in the declaration the entire consideration applicable to all promises collectively."

By the plea of non-assumpsit, we pleaded that we did not assume in the manner and form set forth in the declaration. By the plaintiff's request to amend in this particular, and a material particular, he admitted that we had not. He then alleged for the first time that one of the defendants, Mr. Boren, had received any consideration for his alleged promise. We submit that that character of amendment ought not to be allowed at bar. But the liberality of the court to the plaintiff did not stop there. It allowed him to make another amendment. It allowed him to allege that the contract contained another burden to be assumed by the defendants; that they were to protect Porter against a debt due by him on an open account to the company. Thus the declaration was amended in the two important particulars of a contract, viz.: In the benefits it confers and in the burdens it imposes. Surely that was not rehabilitating the old cause of action. It was introducing a new one.

Your petitioners recognize that great liberality is, under the modern practice, shown in allowing amendments of pleadings; but they submit that the rule is never allowed to work an injustice or bolster up a weak claim supported only by "hazy and conflicting" statements. It is allowed where by some error in the pleader he has failed to state what was originally intended to be stated, or where some unexpected development in the testimony produces some unexpected change in the contract which the pleader could not anticipate. But no case can be produced where the plaintiff and his agent, who helped to negotiate the alleged contract, had, previously to the pleading allowed to be amended, each made a sworn statement of the contract substantiating the original pleading, and contradicting the amendments allowed. In such a case, to allow an

amendment would be, not to have the pleadings comform to the truth of the case, as alleged in his own previously sworn statement, but to conform to those variations in his testimony into which he, in his uncertainty, has led himself. Your petitioners insist that the lower court erred in showing such liberality, and that the Circuit Court of Appeals erred in sustaining that error.

In the practice of the allowing amendments to pleadings at law, the courts of the United States are guided by the laws of the States in which the litigation is had.

In *Chamberlain* v. *Mensing*, 51 Fed. Rep., 511–512, Judge Simonton said:

"The law in this State, which in this matter is the law of this court, is that no amendment proposed at the trial of a case can be permitted if it introduces a new cause of action, thus changing substantially the claim of defense."

It remains, then, to enquire whether the law of West Virginia will, during the trial of a cause, allow an amendment which introduces "a new cause of action, thus changing substantially the claim of defense." The decision of the Supreme Court of West Virginia in *Kuhn* v. *Brownfield*, 34 W. Va., on p. 258, leaves no doubt on that point. The court there says: "I concede that under this statute of amendment, or at common law, a new cause of action cannot be introduced." We need, therefore, only to enquire whether the amended declaration not only alleges an additional consideration to one of the defendants for entering into the alleged contract, but also makes a claim for other money from the defendants, not because of the Stewart and Silver debts, but because of an account due to the Porter Company.

In *Ball* v. *Claplin*, 5 Pick., on pp. 304-305, Ch. Justice Parker says:

"The rule is simple and clear, and yet it has been found difficult of application. * * * It must be for some cause of action; that is, the subject matter of the new count must be the same as the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing."

In *Cassell* v. *Cooke*, 8 Sergt. & Rawle, on p. 287, the court said:

"The fine criterion is, whether the alteration or proposed amendment is a new and different—another cause of controversy—or whether it is the same contract or injury, and a mere permission to lay it in the manner which the plaintiff considers will best correspond with the nature of

his complaint, and with his proof and the merits of his case." See *Railroad Co.* v. *Wyler*, 158 U. S., 285-292 *et seq.*, and cases cited.

In *Mitchell* v. *Adams*, 16 W. Va., pp. 245-265, the principle under discussion is stated as follows:

"In this case, when formerly before this court, it was decided that in actions founded on special contracts to recover damages for the failure and refusal to perform the same, generally the entire consideration must be stated, and the *entire act to be done* in virtue of such consideration, and that generally in actions on special contracts, if any part of the contract vary materially from that which is stated in the declaration, it will be fatal, a contract being an entire thing; and if the contract proven is materially variant from that described in the declaration, on the motion of the defendant's counsel at the close of the plaintiff's evidence it should be excluded from the jury; but to justify such exclusion the variance must be manifest, when viewed in a light most favorable to the plaintiff, as on demurrer to the evidence by the defendant."

And on page 265, the court applying that principle, said:

"Within the spirit of these decisions, if there be a material variation in describing the articles sold between the declaration and the proof, such variation would be held materaal and fatal to the suit. A comparison of the property sold, as stated in each of the several special counts, with the property which the proof showed was to be contracted to be sold in the case now before the court, will show that they are materially variant. A material portion of the property actually sold, as shown by the proof, being omitted in each of the special counts."

The case of *Clark* v. *Railway Co.*, 39 W. Va., 732, while going to an extreme, is not, however, broad enough to cover the case at bar. Here the amendments do not cover simply a *breach* of a contract correctly stated, but introduce an allegation of a different *covenant*, as to a matter not alluded to in the original declaration, viz., the open account. Surely, that was setting up a totally different claim. But that was not all, for the plaintiff was allowed to set forth a new consideration for the contract. Such liberality would destroy all rules of pleading.

We submit that the amendments in the case are covered by the principles just quoted—that the variance was fatal, and that the court erred in allowing the amendments.

"It is no answer to this objection that the defendant

was probably not misled in its defense. * * He may know even precisely what he is sued for when the summons alone is served upon him. Yet he has a right to have a complaint, to learn from that what he is sued for, and to insist that it shall state the cause of action," &c., &c. *Southwick* v. *First National Bank*, 84 N. Y., on p. 429.

We submit that the amendments should not have been allowed. For this error we claim that a new trial should be granted.

EXCEPTION 4.

Your petitioners insist that it was error to refuse continuance after allowing the amendments. We have already argued that the amendments allowed were of a very important and material nature. Even if the court should hold that the changes were such as could be made after the closing of the plaintiff's testimony; yet we submit that they were nevertheless not only material changes, but neither of them pertained to the subject matter of the suit, viz.: the release from the amount due on the liens. Not only claims, which had never been heard of before, but claims which had been virtually denied by both John Porter in his injunction bill, to the allegations of which he swore, and by James M. Porter in his affidavit made to support said bill. Your petitioners submit that surely this is a proper cause in which to apply the well recognized rule that when a material change is allowed, the opposite party may have a continuance. 2 Desty Fed. Pro., 8th Ed., § 478, p 808; 3 Amer. & Eng. Enc. of Law, bottom page 816; *Travis* v. *Peabody Ins. Co.*, 28 W. Va., 583; *Riggs* v. *Fenton*, 3 Mo., p. 28; *Bradbury* v. *Dougherty*, 7 Blackf., 407.

EXCEPTION 5.

It was proposed to show that it was at Vance's solicitation that Lance began negotiating for the 710 shares—and he was asked "at whose solicitation." The question was objected to and objection sustained. We have already in our statement of this error above shown the injustice wrought us. We propose now only to show how the Circuit Court of Appeals erred in commenting upon the evidence bearing at that question. In its opinion the court says:

"If offered for the purpose of showing that Lance would have no dealings with Porter, it is negatived by the

fact that he did have dealings with him, that is to say, that he did go to that meeting, &c., for the purpose of some negotiation respecting this stock."

Yet the record that Lance says he went to Steubensville "on that telegram to see *Mr. Vance.*" "I came here to see you." "Mr. Vance telegraphed me from Pittsburgh to New Cumberland to meet *him*," &c. It shows that he refused to deal with Porter. Vance virtually admits that Lance told him he would not deal with Mr. Porter. See p. 40.

Your petitioners submit that the Circuit Court of Appeals erred in sustaining the Circuit Court.

EXCEPTION 10, 11, 12, and 13.

All of these exceptions apply practically to the same piece of evidence, which was ruled out, and will therefore be noticed together.

Outside of the testimony of the Porters and of Mr. Vance the plaintiff only introduced two witnesses and they attempted to show admissions on the part of Boren. The testimony of the Porters and of Vance being, as has been stated by the United States Circuit Court of Appeals, "hazy and conflicting," it was of course desirable for the plaintiff to introduce evidence of an admission if possible. The witness Stewart stated that Boren admitted that "we" did promise to pay the Stewart and Silver liens. Upon cross-examination he attempted to show that "we" meant Mack and Boren. Your petitioners attempted to show that he meant the Mack Manufacturing Company, but were denied that right.

"Facts necessary to be known to explain or introduce a fact in issue, or relevant, or deemed to be relevant to the issue, or which support or rebut an *inference* suggested by such fact," &c., &c., are proper testimony. Stephens Dig. Law of Evid., 4th Ed., pp. 19 and 20.

Your petitioners attempted to prove that the company had promised to pay off those liens, in order to show some ground for Boren's statement, that he was speaking of the company. Can it be fairly contended that your petitioners were rightfully confined by the ruling (which brought forth the 10th exception) to merely asserting that Boren meant the company, and that we were rightfully refused all opportunity to prove the promise of the company. Was not such evidence proper to "explain" why Boren said "we" promised to pay off those liens? Was it not proper evidence to "rebut an inference," which Stewart in his

cross-examination intended to strengthen? Your petitioners submit that even if Boren had not been rightfully entitled to rebut the inference, yet the evidence should have been allowed in to save Mack, who was not present, from being hurt by a remark, which, unexplained, would seem to be an admission.

The Circuit Court of Appeals, in upholding the trial court, erred, but it again failed to state the facts as they appear in the record. It says: "A copy of the minutes of this meeting was put in evidence without objection." Yet the record shows that it was not allowed in. The trial court would not even let the defendants below prove the year in which the company made the promise. See Exception 12.

As we have said above, if we were entitled to introduce the minutes of the company to show that the company had promised to pay the liens, we were also entitled to explain why they were mentioned as aggregating $10,000. The fact that that evidence would, at the same time, prove Porter willing to deceive, and thereby effect his credibility before the jury, could not effect our right to introduce it. The court refused to allow us to make that explanation. Your petitioners next attempted to prove orally, and not by the minutes of the company, which had been ruled out, that on May 9th, 1891, the company had promised to pay off the liens. The court thereupon refused to allow your petitioners to fix the time at which the promise was made, and ruled that we should only prove that at some time before Boren met Stewart the company had made that promise. Of course, that ruling would have made the proof so indefinite and unsatisfactory as to make it practically worthless in the eyes of the jury. Your petitioners, therefore, excepted to the ruling. Thereupon the court says: "Then I will exclude it all." The effect of this last ruling was to deprive us of even proving, in the most indefinite way, that the company had made any such promise, and to deprive us of all opportunity of explaining what was really meant by the alleged admission. This, your petitioners insist, was clearly error. Admissions are in the eye of the law of that class of testimony which should be received with great caution. The ease with which a mistake can be made in repeating a conversation causes the law to look with doubt on such testimony. But here the trial court received the evidence, and refused to allow evidence to be introduced which would tend most clearly to explain what was meant.

We submit the Circuit Court of Appeals erred in not declaring such rulings not to be errors.

EXCEPTION 14.

The plaintiff had undertaken to prove by O. S. Marshall what was done and said on a certain occasion, at which the defendant, Boren, was present. The proof was offered to establish an admission from Boren that the contract was made at Steubenville. The court allowed Marshall to state, as far as he could, the conversation which took place on that occasion. But when we offered to prove by Boren that no such conversation took place, and to state what did take place, the court refused to allow us to state what was the conversation had on that occasion. Upon what principle of justice can it be contended, that we could not give our version of what was said and done on that occasion? Is it to be seriously contended that we had to accept their version of what was said and done? Yet that was just what the lower court ruled. It refused to allow us to prove what was said and ruled that the witness "can tell the purpose he went there for, and *that is all* the court will permit him to do." The lower court failed to see that the question was not as to the purpose with which he went to the meeting, but it was what was said and done at the meeting. And we were not allowed to present our side of the transaction. Surely when evidence as to the admissions are held by the courts to be of a deceptive and dangerous character, the courts will not allow one side to give in its version of a conversation for the purpose of proving an admission, and then refuse to allow the other side to give its version of it, but force the latter side to stand before the jury upon a bald denial. Such a ruling, standing by itself, would have worked injustice; but when the court makes two such rulings—one as to the Stewart interview and one as to the Marshall—the injustice is not only manifest, but glaring.

Your petitioners pray the court the application of the rule quoted above from *Deery* vs. *Cray*, 5 Wall., 796, "When it is sought to apply the rule, that a court of error will not reverse, where an error works no injury, it must appear beyond doubt that the error complained of neither did prejudice nor could have prejudiced the party against whom the error was made."

You petitioners submit that they were hurt by the said ruling, and that the Circuit Court of Appeals erred in not so deciding.

EXCEPTIONS 15, 16, AND 17.

These exceptions were made to the different rulings of

the court holding that the witness Mack should not testify as to what took place between himself and Vance before the contract of sale was made. The plaintiff had undertaken to prove that we had a contract with him as to the purchase of the stock. We contend that we had not; that the only contract we had was with the bank; that so far from having a contract with the plaintiff, we had refused to buy if the plaintiff owned the stock. We insist that we had a right to prove the conversation which took place at the time of the contract, to show what prompted us to make the contract, or to refuse to make it. "Where the issue was, whether certain property had been sold to the defendant or a third person, it was held competent for the plaintiff to show that just before the sale he had been advised not to sell the property to such third person, and that he may prove this by the person who gave him the advice." Wood Evid., p 428.

"The declarations of the vendor of goods made at the time of the sale are a part of the res gestæ for the purpose of establishing the sale and its purpose; and, in fact, everything that takes place between the parties to the verbal contract before its completion." Ibid., p. 432.

"Conversations occuring during negotiations, as well as instruments given, are competent to show the nature of transactions and parties to be benefitted. They are not adduced for the purpose of proving facts stated or affirmed in the conversations, but to prove the conversations themselves as facts, and are not hearsay, but original evidence." *Bank* vs. *Kennedy* 17 Wall., p. 19; Whart. Evid., p. 323; Taylor Evid., § 320.

But the lower court decided against us on the ground that "it would certainly be unjust to bind Mr. Porter in his absence by a conference that took place in his absence." We submit that that rule does not apply in this instance. If we had attempted to prove any conversation as to the contract alleged by Porter, that rule might be applicable, unless in conflict with the rule as to *res gestae*. The reason of that rule as to conversations had out of the presence of the objecting party, is because, generally, the evidence as to the conversation is offered to prove knowledge in, notice to or acquiescence by the opposing party. But here no such purpose was had. We did not attempt to prove anything as to the contract alleged by Porter. We proposed to show that we bought from another man; to prove another contract entirely, and why we bought. We submit that the rule cited by the lower court has no application whatever. Indeed Vance was sufficiently Porter's

agent to allow the introduction of any evidence as to the conversations between Vance and Mack. Your petitioners insist that the Circuit Court of Appeals erred in not holding such ruling to have been error.

EXCEPTION 18.

The verdict rendered in this case was "Ten thousand four hundred and forty-three dollars and sixty cents." Your petitioners made objection in the trial court to said verdict upon the ground that it embraced four hundred dollars due on the open account, although the amended declaration nowhere contained any allegation of a *breach* as to the alleged promise to pay said open account. See pages 23 and 88 of the record.

The declaration as amended in this case sets forth as a part of the contract made by the defendants, for breaches of which this suit was brought, that the defendants, John M. Mack and G. B. Boren, "undertook and agreed to and with the said plaintiff that an indebtedness of the plaintiff to the said John Porter Company on an open account, the amount of which was not then definitely known, should be cancelled, and that the said defendants would pay off the same and that the plaintiff should never be sued therefor, but was then and there free from the same," but no breach of the above quoted agreement or failure to perform the same is alleged in the declaration as amended, nor are damages claimed for any such breach.

In the suit of the John Porter Company, whose name was afterwards changed to the Mack Manufacturing Company, the court in Ohio, at Steubenville, gave judgment against John Porter for the amount of his indebtedness to the John Porter Company on an open account, being a sum of four hundred dollars, and also gave judgment for the sum of fourteen thousand three hundred and seventy-two dollars and twenty-seven hundredths, the amount of the Silver and Stewart liens, aggregating fourteen thousand seven hundred and seventy-two dollars and twenty-seven hundredths, with interest. A credit of fifty-seven hundred dollars, as of February 21st, 1893, was made on said judgment, amounting to $14,772.27, and interest, and the court at Steubenville, Ohio, gave judgment against John Porter for $9,190.63, with interest from February 21st, 1893, until payment. On the last mentioned judgment suit being brought in Hancock county, West Virginia, by the Mack Manufacturing Company, judgment was rendered July 2nd, 1894, for $9,941.20, with interest from the date of the judg-

ment until payment, said $9,941.20 being the aggregate of the $9,190.63 and interest thereon to July 2nd, 1894.

The defendants below assigned as error that the said Circuit Court of the United States rendered judgment against them for the sum of $9,941 20
Interest from July 2nd, 1894, to April 18th, 1895, 472 20
And costs, 30 20

$10,443 60

with interest from April 18th, 1893, until payment, and thus included in said judgment as aforesaid damages for breaches of agreements not alleged to have been broken in the declaration, and damages not demanded in said declaration, to-wit: the amount of said open account for $400 and interest thereon, since in the declaration the plaintiff alleged no breach of the contract as to protecting him upon the open account he could not recover for any such breach.

"The breach of the contract, being obviously an essential part of the cause of action, must in all cases be stated in the declaration." 1 Chitty Plead, p. 342, bottom page 433. And on page 347, bottom of page 349, the same work says: "The omission of a breach cannot be aided or cured even by a verdict."

The Circuit Court of Appeals met this clear error by saying: "Judgment had been recovered against the plaintiff by the company, which judgment included both liens and open account, and the cause of action in this case was the breach of the contract which consisted in the procuring of that judgment."

Your petitioners submit that that cannot be a satisfactory answer to the objection that while the plaintiff sued upon said contract and alleged a breach of it as to *one* part, yet he has recovered damages for *another* part, which he has never alleged was broken. Again the court is mistaken in alleging that the cause of action in this case was the breach of the contract. A cause of action can only be ascertained by the declaration. The declaration in this case alleges no breach except as to the failure to pay the two lien debts. It was an error to allow him damages for that for which he never sued.

Your petitioners insist that the Circuit Court of Appeals erred in not reversing the judgment for that cause.

JOHN M. MACK and G. B. BOREN.

By Counsel:

SHELLABARGER & WILSON,
MEREDITH & COCKE.

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# IN THE

# Supreme Court of the United States.

JOHN M. MACK AND G. B. BOREN,
*Plaintiffs in Error.*

*vs.*

JOHN PORTER,
*Defendant in Error.*

*In re Petition for certiorari.*

MEMO. IN OPPOSITION TO PETITION.

# IN THE

# Supreme Court of the United States.

JOHN M. MACK AND G. B. BOREN,
*Plaintiffs in Error.*

*vs.*

JOHN PORTER,
*Defendant in Error.*

*In re Petition for certiorari.*

MEMO. IN OPPOSITION TO PETITION.

John Porter, the defendant in error, opposes the application for a writ of certiorari.

The judgment of the Circuit Court of Appeals is made final in this case, under section 6 of the Act of March, 1891. "An act to establish Circuit Courts of Appeals" &c.

It is only when questions of gravity and importance are involved "that the power of this Court to require a case in which "the judgment and decree of the Circuit Court of Appeals is made "final, to be certified, can be properly invoked. The inquiry upon "this application, therefore, is whether the matter is of sufficient "importance in itself, and sufficiently open to controversy to "make it the duty of this Court to issue the writ applied for in "order that the case may be reviewed and determined as if "brought here on appeal or writ of error." *Lau Ow Ben*, Pet'r, 141, U. S., 587; In re *Woods* Pet'r, 143 U. S., 205; *Lau Ow Ben vs. U. S.*, 144 U. S., 58; *Amer. Const. Co. vs. Jacksonville Railway*, 148 U. S., 383.

There is no diversity of judgment between different Circuit Courts of Appeals respecting any question involved in this case, and there is no question involved in the case which has any importance as a legal question.

This will appear at a glance from an examination of the assignments of error in the Circuit Court of Appeals. See printed record in that Court pp. 81–89.

Those assignments are seventeen in number. They have relation as follows:

No 1. To the exclusion of evidence showing which party to a written agreement collaterally in evidence suggested a certain part of that agreement.

Nos. 2 and 3. To an amendment of the plaintiff's declaration, permitted and made at the trial.

No. 4. To the refusal of an application for a continuance on account of such amendment.

Nos. 5 and 14. To the exclusion of evidence showing who began a negotiation between one of the defendants and a third party in the absence of the plaintiff.

No. 6. To the exclusion of evidence that one of the defendants offered to restore to the plaintiff upon certain terms, certain stock not involved in this action, which had been pledged as collateral with that defendant and had been sold by him.

Nos. 7, 8, 9. To the exclusion of evidence of certain notices given by last mentioned defendant to the plaintiff that he would sell the lot of stock so pledged, with which this action has nothing to do.

No. 10. To the exclusion of evidence tending to show what another defendant had meant by his statements in a conversation which the plaintiff had proved in evidence.

No. 11. To the exclusion of evidence that the plaintiff had, long before the making of the contract sued on, misrepresented the amount of a certain debt, the correct amount of which was known to the defendants when they made that contract.

Nos. 12 and 13. To the exclusion of evidence that a corporation had assumed to pay off certain liens, which the plaintiff claimed the defendant had also agreed to pay off.

Nos. 15 and 16. To the exclusion of evidence that one of the defendants in the absence of the plaintiff, and before the making as alleged by the plaintiff of the contract sued on, had declared that he would not make any contract with the plaintiff.

No. 17. To the fact that the judgment included an item of four hundred dollars, as to which the defendants claimed that no breach was alleged in the plaintiff's declaration.

The foregoing statement does not undertake to state these questions fully and accurately, or to show just how they arose, or to present their merits or want of merits. It merely shows the general nature of the questions. It will be seen that four

of them are questions of practice and thirteen questions of the admissibility of evidence. The assignments show that not one of the seventeen relates to any matter of gravity or importance, in the sense which would warrant interference by this Court. This would be so even if these questions were important to the litigant, but the record has shown to every Court which has had jurisdiction of the case, and would show here that every one of those questions was trifling to the last degree, even as between the parties.

The only real question in this case was a question of fact for the jury. That was decided against the defendants. They have sought to relitigate that question before the Circuit Court upon a motion for a new trial and before the Circuit Court of Appeals upon a writ of error. It was decided against the defendants in each forum. They now seek to relitigate that fact here.

Strange as it may seem, the petition here for a certiorari instead of suggesting any reason why the judgment of the Circuit Court of Appeals, final under the statute, should be inquired into by this Court upon certiorari is devoted in some measure to alleging errors in that judgment as if it were here upon writ of error, but for the most part is devoted to an argument here upon the facts, which were long since conclusively settled by the constitutional triers of fact.

Should we be mistaken in the opinion that this Court will not inquire into rulings such as those here alleged as erroneous any more than it will inquire into questions of fact, we respectfully refer as to those rulings to the opinion of the Circuit Court of Appeals, a copy of which is to be filed with the petition, and to our brief in that Court, copies of which brief are herewith filed.

HENRY M. RUSSELL,
WILLIAM P. HUBBARD,
*Attorneys for John Porter, defendant in error.*

Wheeling, W. Va., February 27, 1896.

# UNITED STATES CIRCUIT COURT OF APPEALS.

## FOURTH CIRCUIT.

No. 145.

JOHN M. MACK AND G. B. BOREN, *Plaintiffs in Error,*

v.

JOHN PORTER, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WEST VIRGINIA, AT WHEELING.

BRIEF FOR DEFENDANT IN ERROR.

Additional authorities noted.

# UNITED STATES CIRCUIT COURT OF APPEALS.

## FOURTH CIRCUIT.

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No. 145.

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JOHN M. MACK AND G. B. BOREN, *Plaintiffs in Error,*

v.

JOHN PORTER, *Defendant in Error.*

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WEST VIRGINIA, AT WHEELING.

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BRIEF FOR DEFENDANT IN ERROR.

The controversy in this case is within narrow limits. Some facts are undisputed. There is no dispute that John Porter had told to the corporation, which for convenience, we shall designate as the Mack Company, certain real estate subject to liens which Porter was bound to satisfy, that to secure the performance of this obligation Porter had pledged with the company fifteen thousand dollars of its stock; that he was also indebted to it in a sum, afterwards ascertained to be about four hundred dollars; that Porter was indebted to George B. Boren in about twelve thousand dollars, to secure which he had pledged other fifteen thousand dollars of the stock of the company; that Porter had pledged other stock

of the company to John Mack, to secure certain notes to him, which stock had been sold toward the satisfaction of those notes, but at a price which left a large amount unpaid on the notes held by Mack, and that Porter was indebted in a large amount to the Exchange Bank, of Wheeling, which held seventy-one thousand dollars of Porter's stock in the Mack Company, as collateral security.

Here the dispute begins. Porter claims that at Steubenville, Ohio, on December 1st, 1891, a contract was made between Porter on the one hand and Mack and Boren on the other, whereby Porter consented that the Exchange Bank might sell the seventy one thousand dollars of stock to Mack for forty-one thousand dollars (to be applied on his indebtedness to the bank), whereby Porter sold to Boren at sixty-five cents on the dollar, the fifteen thousand dollars of stock which Boren held as security, (these sales transferring to Boren and Mack the control of the Mack Company), whereby the fifteen thousand dollars of stock held by the Mack Company should be transferred to it absolutely, and whereby Boren and Mack agreed that they would assume the amount of the liens upon the real estate, which Porter was bound to pay, and would assume his indebtedness of four hundred dollars to the company, and agreed that they would pay the same, and that Porter should never be sued on account thereof, and that the notes of Porter held by Mack should be cancelled and returned to Porter. If this contract, as alleged by Porter, was made, it was completely made at Steubenville, on the day mentioned. Porter claims nothing prior or subsequent to this as constituting any part of the contract. The only question in the case is whether this contract was made, whether Mack and Boren made this agreement, at the time and place mentioned. There is no claim upon the part of the defendants that any such agreement was fulfilled by them, and the evidence is undisputed that if any such agreement was made it was broken by the defendants.

The issue being thus narrowed to the question of the making of this contract, the jury found upon all the evidence which was submitted to them that the plaintiff was right in

his claim and that this contract was made, as alleged by him.

While the only question for trial by the jury was the question which we have just stated, the defendants sought to try many other distinct and independent questions of a trifling nature. These efforts being unsuccessful by reason of the rulings of the trial court, exceptions were taken in each instance, and these constitute almost the whole of the long catalogue of assignments of error, found in this record.

The brief of the defendants kindly offers the hurry of a jury trial as an apology for these rulings. If these rulings had been as plainly wrong as they are plainly right, this apology would not have sufficed, as the record shows that four days were given to this case, devoted in part to the trial of this single question upon the evidence of a half dozen witnesses, and in a larger part to the attempts of the defendants to divert the attention of the jury to the side issues.

This single and real question in the case was decided by the verdict of the jury, and this finding cannot be interfered with because of any of the matters which were shown in evidence, incredulous as the defendants' counsel may affect to be that such a verdict was possible.

In their effort to avoid this real controversy in the case the defendants endeavored to try these questions:

Whether Mack in his subsequent arrangement with the bank to take this stock, which arrangement was put into writing, insisted on a provision in that writing, which shows that Mack was unwilling to deal with Porter. (Exception 1.)

What occurred between Mr. Vance for the bank, and Mr. Mack or his agent in the negotiations for Mack's purchase from the bank. Exceptions 5, 15, 16, 17.)

Whether Mack had been liberal or fair with respect to the sale he had long before caused to be made of the stock of Porter's which he held as security for Porter's notes. (Exceptions 6, 7, 8, 9.)

Whether Porter had correctly stated to the Mack Company, in September 1891, the amount of the liens on the real estate which it had bought for him. (Exception 11.)

Whether, before certain admissions which Boren had made to the witness Stewart, the Mack Company had assumed to pay off those liens. (Exceptions 10, 12, 13.)

Whether Boren had threatened to sue Porter, unless Porter settled his account with Boren personally. (Exception 14.)

Much indulgence was shown the defendants' counsel in their efforts to introduce testimony as to these irrelevant matters. The plaintiffs' counsel often forebore to object in the hope that time would be saved by letting the irrelevant testimony in. The court, too, was liberal towards the defendants. It was only when the purpose to befog the real question became apparent that the plaintiffs' counsel objected, or the court without waiting for such objection interfered to confine the parties to the real controversy.

The efforts here, by the defendants' counsel, to show the pertinency of their excluded evidence is for the most part based upon a claim that the real controversy here, or as they express it, brief, page 22, "the immediate and main fact in controversy around which all the other facts and circumstances group themselves was the sale of the seventy shares" to Mr. Mack. There is not, and never has been any controversy as to that sale. Those shares were sold by the bank to Mack after Porter, who had an equity of redemption in them, had given his consent at Steubenville. They had been transferred and paid for and no question has ever been made on that subject. That was a transaction wholly between Mack and the bank, in which the bank took part because Porter had released to it his interest in the stock upon its agreement to credit him with the price of the stock, a price which, by the way, was greater than that paid by Mack to the bank. At Steubenville, on December first, Porter parted with his equitable interest in that stock to the bank. The next day in Wheeling the bank sold the stock to Mack at a different price. This was an entirely distinct contract, the terms of which interested only Mack and the bank, and were settled by these parties only. Porter had no concern in this arrangement. The bank was at liberty to sell the stock at what price it pleased, on what terms it pleased, having agreed to give

Porter credit at the rate of sixty cents on the dollar for the stock. The fact that the bank was persuaded to give this price to Porter by its knowledge that Mack would give forty-one thousand dollars for the seventy-one thousand dollars of stock, or even its contract with him that he would do so, does not alter the fact that so far as Porter was concerned his contract with all these parties was complete at Steubenville. Nothing was left to be determined by him thereafter as any part of the contract. All that was necessary so far as he was concerned was that he should comply with his agreement then and there made, and that the other parties should do the like. At Steubenville the bank agreed to credit Porter at the rate of sixty cents on the dollar. Boren and Mack assumed Porter's liabilities, in which the Mack Company had an interest, and agreed to cancel the notes which Mack held against Porter. The bank has complied with its contract made at Steubenville. Boren and Mack have not complied with theirs. Hence this judgment.

## EXCEPTION TO THE EXCLUSION OF EVIDENCE THAT MACK INSISTED ON A PROVISION IN HIS CONTRACT WITH THE BANK, SHOWING THAT HE WAS UNWILLING TO DEAL WITH PORTER. EXCEPTION. I.

After the agreement was made in Steubenville between the plaintiff and Mack and Boren, the parties separated, Vance and Mack, with Lance, Mack's agent, going together to Wheeling, where Vance lived, where the Exchange Bank was located, and where Jones, the cashier of that bank, and the trustee in whose name the stock stood, was presumably to be found. On the next day, acting on the consent which the plaintiff had given as a part of the contract made at Steubenville, the Exchange Bank and Mack effected the sale of the stock, entering into a written agreement which was introduced in evidence. This transaction was no part of the contract between the plaintiff and the defendants. It was rather a performance or execution of the contract. The paper executed by the Exchange Bank, Mack and Jones, if it

could be said to have any relevancy to the issue, was relevant only as showing that Mack had received in that way a part of the consideration which he had contracted for in making his agreement with the plaintiff. The contract made at Steubenville, provided, among other things, that the Exchange Bank should be at liberty to sell to Mack the stock held by it at a price which would yield to the plaintiff sixty dollars per share. The paper in question tended to show that this part of the contract had been performed in such a way as to satisfy the plaintiff and to give Mack the stock. This paper was introduced in evidence by the defendants (Record 40) without objection on the part of the plaintiff. Not satisfied with this, however, the defendants attempted to show that there had been some difference between the bank and Mack with reference to the terms of the paper, that a draft of it was made and submitted to Mack's attorney, at whose instance changes were made in the draft, and that these changes went into the paper as finally executed.

It would perhaps be sufficient to say with regard to this evidence that the preliminary negotiations of the parties are unimportant and irrelevant when the final agreement has been, as in this case, reduced to writing and executed. What difference does it make who wrote the different portions of the paper? The parties finally agreed upon it in the form in which it now appears.

The evidence, however, was entirely irrelevant to the issue. The question in dispute, and the only question, was whether the contract had been made at Steubenville as the plaintiff claimed. What light could it throw upon that question to show that Mack and the bank disputed about the terms of an instrument which was not the contract in issue, onr any part of it, but was a paper executed because that contract had in fact been made and was complete? It made no difference to the plaintiff what the form of that paper was, so long as Mack and the bank was satisfied with it. Porter was to get his sixty dollars per share, whatever Mack and the bank might do in their dealings with one another. If the bank chose to sell the stock to Mack for less than

sixty dollars per share, it must, nevertheless, account to Porter at that price. And this is what the bank in fact did. If the bank chose to give Mack time to pay for the stock, or chose to assent to any other conditions which he might suggest, that was a matter between Mack and the bank. It was wholly immaterial to Porter what they did. This is true on the assumption that the contract was as Porter claimed it to be. It is manifest, therefore, that the fact sought to be presented by the evidence in question may have existed, although the contract was made at Steubenville, as Porter claims. Hence, to establish that fact, would not tend in any wise to disprove the existence of the contract.

The counsel for the defendants, on page 20, of their brief inadvertently say that the agreement between Mack and the bank had been put in evidence by the plaintiff before the defendants offered the evidence which is now being considered. The record on page 40 shows that this is a mistake. The paper was put in evidence by the defendants in connection with the cross-examination of the witness Vance. This mistake is perhaps not important, unless it might be suggested that, if the plaintiff had introduced the paper, the defendants might be entitled, for that reason alone, to show everything had been done in the preparation of it.

It is suggested that the amendment to the paper proposed by Mr. Mack or his attorney, tended to show that Mack insisted upon dealing with the bank alone, and was unwilling to deal with Porter. This is supposed to show that the agreement at Steubenville had not been made because, if Mack was unwilling to deal with Porter, he would not have entered into a contract with him. It does not seem to have occurred to counsel for the defendants that Mack might have changed his mind over night, or that he might have made the contract at Steubenville on one day and regretted it the next, or that his attorney who made the suggestion for the change may not have been told about the Steubenville contract. But the trouble about this evidence is that it does not show any such thing as is claimed for it. The paper, as originally drawn, provided for the sale of these shares by the bank to Mack. It described the shares as standing in the

name of Jones, and a memorandum is found at the foot of the paper reciting that Jones held the shares in his name, that he held them for the use and benefit of the bank, and, providing that he would carry out the bank's agreement. Under that draft, the transfer of the shares would have been made to Mack, not by John Porter the plaintiff, but by Jones, in pursuance of the bank's agreement. The change suggested by Mack's attorney merely required that the bank should have the shares transferred, not from Porter who had already transferred them, but from Jones to the bank, so that the bank would eventually make the transfer to Mack. Now, if this change tended to show anything, what it showed was merely that Mack preferred to deal directly with the bank, rather than with Jones, and not that he preferred to deal with the bank rather than with Porter.

The principal stress of the lengthy and elaborate brief for the plaintiffs in error, the defendants in the court below, is laid upon the doctrine of *res gestae*. It is said that the objection to the paper made by Mack's attorney and the modification of the draft in pursuance of the objection were a part of the transaction in issue and therefore admissible without regard to the plaintiff's presence. These circumstances are feigned to be, as it were, unconscious or involuntary acts or expressions arising out of and giving color to the main fact in controversy.

This whole doctrine of *res gestae* relates to matter of evidence which under other rules would be inadmissible. For example, it relates to statements or expressions of the plaintiff made in the absence of the defendant, and which would be inadmissible under the ordinary rule that what a party says out of court and in the absence of his adversary cannot be proved in his favor. Thus, the victim of an accident describes to his physician the pains which he may feel, while the physician is attending him and endeavoring to make a correct diagnosis of his condition. These expressions become admissible under the doctrine which we are discussing. The servant of the defendant who is employed by it to manage its locomotive is not ordinarily its agent to make admissions. What he may say, therefore, about an acci-

dent which has occurred, cannot be introduced against the defendant. But his statements and exclamations while the accident is happening, illustrating and giving color to what he does, may be introduced in evidence against his master. It will be observed that however difficult it may be to fix precise limits to the rule, and however various the facts which become admissible by reason of it, these facts all possess one distinguishing peculiarity. They are relevant to and illustrate or throw light upon the main fact in issue. The rule respecting the *res gestae* is always applied in subordination to the rule that the evidence must be relevant to the issue. Take the case of *Bank* v. *Kennedy*, 17 Wall. 19, relied upon by the defendants in their brief. In that case the question was whether a certain loan was made to one Sherman or to the bank of which he was cashier. Sherman had borrowed the money to enable him to purchase stock of his own bank, and he used the two drafts in which the money was given to him, in the purchase of stock from one of the directors of the bank. He had given a note for the loan signed by him individually. The drafts were made payable to him as cashier. The lender of the money claimed that the loan had been made to the bank through Sherman, and that the stock which had been purchased had been purchased by Sherman for the bank. There were therefore two matters in issue, either of which, if found in his favor, would have determined the case on the side of the lender. If the loan had been originally made to the bank, and the intention in procuring and making it had been that it should become a debt of the bank, the lender was entitled to treat it so and to set it off against the claim of the bank. If, though the loan had been made to Sherman, the bank took the benefit of it and used the money in the purchase of stock for itself, the lender would likewise be entitled to treat the loan as made to the bank and set it off against the bank's claim. The conversations which took place at the time when the loan was made and the drafts were delivered to Sherman were permitted to be introduced under the doctrine of *res gestae* although it was objected that they tended to vary the effect of the written drafts. The conversations which took place at the time

when Sherman received the stock and paid for it were permitted to be introduced, although these conversations took place in the absence of the lender. In both instances, as will be perceived, the evidence which was introduced was directly relevant to the transaction in issue and explained and threw light upon that transaction. They were parts of the very transactions themselves.

Now, as has been said, the transaction in controversy in this case was the contract made at Steubenville, on which the action is brought. The evidence in question was not of a fact which was any part of that transaction, nor which in any wise explained and gave color to the acts, or conduct, or language of those who took part in that transaction as they were taking part in it. That transaction was complete. A perfect contract had been made. The rights of all the parties under it had become fixed. Nothing remained to be done in the making of the contract, and what was yet to be done related only to the carrying of it out. The fact under discussion was a part of the transaction which subsequently transpired between the bank and Mack. Had that transaction been in controversy, this fact might perhaps be said to have a bearing upon it. It can scarcely be claimed, however, that evidence is admissible, under the rule relating to res gestae, of a fact which, having no relation to the issue, may illustrate or explain some other transaction about which the jurors are not called upon to inquire.

However pertinent it might be supposed to be, the evidence in question would still be inadmissible under a proper construction of the rule of *res gestae*. It may be true that the admissibility of evidence under this rule does not depend upon the mere lapse of time. It cannot be said, for example, that a declaration which was made by an agent ten minutes after the happening of an accident should be excluded while one made only five minutes afterward would be admissible. Thus in *Railway Company* v. *O'Brien*, 119 U. S. 99, the statement of the engineer as to the speed at which a train was running when an accident happened, though made only a few minutes after the accident was held inadmissible, while in other cases under this same doctrine,

facts separated from the main or principal transaction by hours, or even by days, have been held admissible. If not the lapse of time, what then is the reason for this difference? Obviously the test is whether the transaction in issue has been completed, and whether the rights of the parties to it have become fixed. If so, other facts, inadmissible because of other rules of evidence, cannot be introduced under this exceptional doctrine of *res gestae*. An illustration of this limitation of the rule is to be found in the case of *Burley* v. *Bank*, 111 U. S. 216. The plaintiff, as receiver of the Cook County National Bank, of Chicago, sued the German American Bank, to recover a portion of the proceeds of three notes which had been given to the defendant by one Bowen as collateral security for a loan made to Bowen. These three notes were paid, a sufficient amount of the proceeds was applied to the satisfaction of Bowen's loan, and the residue of these proceeds was paid to Bowen. It was this residue which the receiver claimed. Bowen was a director in the Cook County Bank and its agent in New York, and the claim of the plaintiff was that the notes did not belong to Bowen, but to the Cook County Bank, and that the defendant had been notified of this fact before the notes were paid. On the trial the plaintiff sought to introduce in evidence the entries made in the books of the Cook County Bank, after the notes had been paid and the surplus disposed of, as tending to show, under the doctrine of *res gestae*, that the Cook County Bank had treated these notes as its own. This evidence was excluded and its exclusion was alleged as error. The Supreme Court of the United States said: "The exclusion of these entries was proper. The rights of the defendant could not be barred by entries thus made, because they were not contemporaneous entries made in the due course of business, as a part of the *res gestae*, but were made by one of the parties after the rights of the other party had become fixed." In the case at bar the rights of the parties to the Steubenville contract had become fixed. Mr. Mack, one of the parties to the contract, could not by anything which he might do modify the rights of Mr. Porter, the other party. Neither what Mack might say or what he

might do would be anything else than his own interpretation of a transaction which depended upon its own facts, and parts, and elements, and not in any respect upon how Mr. Mack might interpret it, whether by word or deed.

This limitation of the rule has been applied to cases which are quite analogous to the case at bar as that is explained by the defendants' counsel in their brief. They wish it to be understood that the controversy here is whether Mr. Mack dealt and made a contract with Mr. Porter, or whether Mr. Mack dealt exclusively with the Exchange Bank. That is not really the case at bar. The real controversy is whether the contract which Mr. Porter says was made at Steubenville, was in fact made. There is no controversy that Mr. Mack subsequently dealt with the Exchange Bank. Whether he dealt with it because of the Steubenville contract and in the course of carrying it out, as we say, or whether he dealt with it, no contract having been made at Steubenville, as our opponents say, he certainly dealt with the bank on the day after the Steubenville interview. But take it as the defendants would have it, as a controversy, whether Mr. Mack dealt with Mr. Porter at Steubenville or with the bank alone, at Wheeling. In *L'Herbette* v. *Bank*, 162 Mass. 137, the controversy was whether a certain deposit which had been given to the cashier of a bank, had been intended for and made with the bank, or had been given to and received by cashier individually. The issue was whether the money was paid to the "defendant's cashier in his individual capacity, to be used by him individually for the plaintiff, or whether it was paid to him as cashier of the bank, and as and for a deposit in the bank." The court says: "Testimony to show that the defendants did not enter on its books the plaintiff's name as a depositor had no legitimate tendency to show that the plaintiff's transactions were not with the bank. This would, at most, be an implied denial by the defendant of its liability, in the absence of the plaintiff, who cannot be affected by its omission to make entries on its books." What else can be said of the evidence here in question? If it tends to show that Mack, on the day after the contract was made, acted as though it had not been made, this would be at most

an implied denial on his part, made in the absence of the plaintiff, that the contract had been made.

Again and again throughout their brief the counsel for the defendants have quoted statements of the law upon the rule of *res gestae* which contained the limitations of which we have been speaking. They have not found it possible to produce a statement of the rule which does not either directly or impliedly contain these limitations. Thus on page 25 of their brief they quote: "A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, *contract*, a wrong." The group of facts which transpired at Steubenville made the Steubenville contract, and that group might properly be referred to as a contract. The group of facts which occurred next day at Wheeling constituted a contract, and that group might be referred to as another contract. To group these two groups together into one and call them a contract would be to sin against grammar, law and logic.

Again on pages 36 and 37: "It is a general rule of evidence that the declaration and acts of the principal parties to an act, as well as the circumstances surrounding them, and accompanying the transaction at the time of the principal fact, may be given in evidence in a controversy between the parties relative thereto, and as a part of the *res gestae* which are calculated to show the nature of the act and are in harmony with it. They must be so closely connected with the principal act in point of time as to be spontaneous and voluntary and to preclude all possible idea of deliberate design." Manifestly this definition of the rule would confine the evidence admissible under it to that of facts connected with the making of the contract at Steubenville. The counsel for the defendants, after quoting this statement of the rule, find it necesary to say that the principal act or fact in the case at bar is the purchase of [illegible] seven hundred and ten shares of stock. The purchase of that stock from the Exchange Bank was not the fact in issue, but was a fact about which there was no sort of controversy.

It is useless, however, to multiply examples from the brief

of the defendants, for we come invariably back to the same proposition that they have wholly mistaken the real issue in the case.

After showing so conclusively that the evidence whose exclusion is complained of ought not to have been introduced, it is with a species of reluctance that we feel compelled to point out that it was in fact introduced, in substance, and that the defendants had the benefit of whatever there was in it. The purpose of the evidence was to show that Mack bought the stock "solely from the bank, and not from the bank and Porter, and that Lance was dealing solely with the bank." Brief p. 20. The written agreement between the bank and Mack, which the defendants introduced without objection, contained the very clause which the defendants think shows that Mack was dealing only with the bank. Idle as this claim seems, the defendants had the benefit of it, and were enabled to base on it their argument that because Mack said he would not deal with Porter, therefore he had not dealt with Porter, an argument which, if proper at all, was properly addressed to the jury, and which the jury has properly disposed of. The fact defdts wanted to prove was practically admitted by pltff. It does not appear that the matter excluded would be cause. For either reason there is no error here. Ger. Ins. Co. v. Clark, 7 Cra 122

## WHAT OCCURRED BETWEEN MR. VANCE FOR THE BANK AND MR. MACK OR HIS AGENT IN THE NEGOTIATIONS FOR MACK'S PURCHASE FROM THE BANK.

### EXCEPTIONS 5, 16, 17.

Mr. De Haven Lance was the agent of Mr. Mack, and he testified that he bought seven hundred and ten shares of stock from Mr. Vance, president of the Exchange Bank, of Wheeling, that he first spoke to Mr. Vance about it at Wheeling, and that he represented Mr. Mack. The question was then asked: "At whose solicitation?" The defendants interpret this to mean, at whose solicitation did he buy the stock. (Brief, page 36.) It certainly cannot have been important to know who began the negotiations for this sale, whether Mr. Vance or Mr. Lance. If Mr. Vance began them,

that fact would not tend to show that the contract was not made at Steubenville, and if Mr. Lance began them, that fact would not tend to show that the contract was made at Steubenville. The truth is that the interpretation given in the defendants' brief cannot be the true interpretation of this question. Lance had already said, "I *first* spoke to him about it at Wheeling." (Record 58.)

Mr. Mack was also asked to tell what took place between him and Mr. Vance about the purchase of the stock some time before the purchase was made, and the court declined to let in the conversation. The defendants then offered to prove that Mr. Mack had an interview with Mr. Vance and that Mr. Vance proposed to sell him this stock, and that Mr. Mack informed Mr. Vance that he would not make any offer for the stock or have anything to do with the purchase of it if Mr. Porter had anything to do with it, and that he would only enter into negotiations if it was the stock of the Exchange Bank. This all took place in the absence of Mr. Porter. (Record 76, 77, 78.) Now what had all this to do with the question, whether at Steubenville Boren and Lance entered into the agreement with Porter upon which this suit is brought? That agreement was that Mack and Boren would stand between Porter and the Mack Company with respect to the two liens, that Porter should never be sued for them, that he should not be sued on the open account of the company, nor on the notes held by Mack; and in return for this that Boren should have certain stock at a price agreed upon, and that the Exchange Bank might sell to Mack the stock held by it at a price which would give Porter sixty dollars per share What if Mack had said to Vance, before that day, that he would not deal with Porter? What if Lance, his agent, had made the same declaration? What if both had still continued to assert the same thing? Was it only a woman who "swearing she would ne'er consent, consented?" May not a man also change his mind, or even be brought against his will to do that which he has said he would not do? When before was it ever heard that a man could show he had in fact not done a thing by proving that he had said before hand he would not do it? What distortion of the rule

relating to *res gestae* has ever been applied to such evidence? Is it possible that such statements as these, made beforehand by the defendant, "may be therefore defined as those circumstances which are the undesigned incidents of a particular litigated act?" (Brief, page 25.) If such evidence were admissible, the trial of causes before juries would be curious phenomena. A defendant on trial for murder, for instance, might testify that in his early youth he had said to his friends that he would never, no never commit a murder. This would be evidence as a part of the *res gestae*, as an incident preparatory for the act. The brief says that the admissible incidents should be "part of the immediate preparation for" the act. (Brief 25.) But then we are also told that "if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestae*." If an interval of a month is not objectionable, there is no reason in principle why the interval should not be extended indefinitely. If the defendant can himself testify to what he once said upon the subject, all his friends may be brought in to tell what they heard him say, and thus the fact of the murder will be tried by investigating the intentions of the defendant as shown by his declarations made long previously.

## WHETHER MACK HAD BEEN LIBERAL OR FAIR WITH RESPECT TO THE SALE OF PORTER'S STOCK HELD AS SECURITY.

### EXCEPTIONS 6, 7, 8 and 9.

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The defendants attempted to show that, before Mack had offered Porter's stock for sale, he had given notice to Porter to attend the sale and look after his interests, and also that the stock was advertised, that the notes for which it was security were long past due, and that, even after Mack had put up the stock for sale and had bought it himself, he offered to give it back to Porter if Porter would pay him, not the price he had paid for the stock, but the amount of the debt for which it was security. (Record 65, 66.)

If we may be pardoned for a reference to fundamental principles of law in the course of a discussion which has been led away so far from them, we will content ourselves with applying to these exceptions a quotation from section fifty-two of First Greenleaf on Evidence: "This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them."

Mr. Mack may have been in a very comfortable and advantageous position on the subject of the disposition which he made of this stock held by him, and may have been very willing to divert the controversy to an investigation of what he had done with respect to it. Unfortunately that subject had not the remotest bearing upon the issue which was being tried.

The defendants suggest that this evidence was proper because Mr. Vance had testified that Porter had complained to him, prior to the making of the contract at Steubenville, that Mack had acted unjustly in the disposition of this stock which he held. No objection was interposed to this testimony of Mr. Vance, though it was brought out by the defendants themselves upon Vance's cross-examination. (Record 39.) If the plaintiff had introduced Vance's evidence of these complaints the defendants might with some plausibility insist that they were entitled to go into the merits and investigate the justice of the complaints, though they were not in issue. Even then, we imagine, their remedy would have rather been to object to the evidence that such complaints had been made. But when they themselves introduce irrelevant and improper evidence they surely cannot make it the basis and occasion for the introduction of additional irrelevant and improper evidence for the purpose of explaining all that they have themselves put into the case.

## WHETHER PORTER HAD CORRECTLY STATED TO THE MACK COMPANY IN SEPTEMBER, 1891, THE AMOUNT OF THE LIENS ON THE ESTATE WHICH IT HAD BOUGHT FROM HIM.

### EXCEPTION 11.

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The defendants sought to prove that the plaintiff Porter had stated in May, 1891, long before the transaction in issue, that the two liens, which in the Steubenville contract the defendants undertook to pay and relieve Porter from, only amounted to about nine thousand dollars. There was no pretense that at the time of the Steubenville contract the defendants did not know the true amount of these liens. It was not intended by this evidence to show that Porter had, by any misstatement in May, 1891, procured the defendants to agree to pay liens which in fact amounted to much more than Porter had stated them to be. The offer of this evidence was a bald effort to show, by one of the defendants, that the plaintiff had made a misstatement with respect to a matter long since past, a misstatement which had no bearing whatever upon the controversy before the jury. The evidence offered was totally irelevant and the defendants in their brief are unable even to suggest any view in which it is pertinent to the case.

## WHETHER BEFORE CERTAIN ADMISSIONS WHICH BOREN HAD MADE TO THE WITNESS STEWART, THE MACK COMPANY HAD ASSUMED TO PAY OFF THOSE LIENS.

### EXCEPTIONS 10, 12 and 13.

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Stewart had testified in effect that Boren had admitted to him that he and Mack had agreed to pay these liens. (Record 35.) This was directly in the line of the testimony of John Porter, James Porter and J. N. Vance with respect to the contract which had been made at Steubenville. To meet this evidence, the defendants undertook to prove that, before

the conversation with Stewart and before the making of the contract at Steubenville, the Mack Company, then known as the John Porter Company, had itself assumed to pay off these liens. (Record 68, 69, 70.) We are at a loss to see how the fact that the company had agreed to pay the liens would contradict Stewart's statement that Boren admitted that he and Mack had agreed to pay off the liens or would contradict the statement of Porter and his witnesses that Lance and Boren had at Steubenville agreed to pay off these liens. The company may have made this promise also, but certainly Boren, and Lance, Mack's agent, also made it, and Boren admitted the making of it.

## WHETHER BOREN HAD THREATENED TO SUE PORTER, UNLESS PORTER SETTLED HIS ACCOUNT WITH BOREN PERSONALLY.

### EXCEPTION 14.

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In quoting the fifty-second section of first Greenleaf on Evidence, we have spent the powder which we might have used on this exception. Porter had stated that in the conversation in which this threat was used Boren had made a certain admission. Boren was permitted to deny that he had made, in that conversation, any such admission as Porter had detailed. (Record 70.) The rest of the conversation was totally irrelevant, but he was permitted to state, in order to strengthen his denial, the object with which he had met Porter at the time. Not content with this, he proceeded to give a wholly irrelevant statement of his threat, and the court very properly called him to order and excluded the threat. What the threat had to do with the case, or why it should not have been excluded, the defendants have not informed us.

## THE AMENDMENT TO THE DECLARATION MADE AT BAR DURING THE TRIAL.*

At the conclusion of the plaintiff's evidence, a motion to exclude it was made by the defendants on the ground that

* The permission to amend was within discretion of trial judge, and is not reviewable, it not appearing plain from the record that the exercise of discretion was "wholly unreasonable". Watts v. Weston 10 CCA. 3. Blewett v. Cable C. 2 CCA. 4. 5.

the contract proved varied from the contract declared upon. Two amendments were thereupon made by the plaintiff to his declaration, the purpose and the only purpose of each being to make the declaration precisely fit the proof.

One of these amendments related to that portion of the agreement made at Steubenville which provided that Boren should take, at sixty-five cents on the dollar, the stock which he held as collateral security for a debt due to him by the plaintiff (Record 56.) This was a part of the transaction about the carrying out of which there was no controversy between the parties. While Boren denied the making of the contract at Steubenville, of which this was a part, and even denied the making of this part of the contract, yet he himself admitted that with respect to this stock held by him, he did what was consistent only with the theory that the contract was in fact made. He already held the certificate for this stock. The transfer on the back of it had been signed by Porter when the pledge was made, and within three days after the Steubenville conference, and without any other communication between himself and the plaintiff, Boren caused this stock to be transferred to himself, and credited Porter with an amount equivalent to sixty-five cents on the dollar for the stock. (Record 75.) That part of the transaction, therefore, was closed. No claim was made against either of the defendants by reason of that part of the agreement which related to the stock held by Boren as collateral. There had been no breach with respect to that part of the agreement. The sole purpose of amending the declaration in this particular was to cause it to conform to the proof in the statement or description of the contract. The change made no modification of any sort in the rights or liabilities, or even in the claims, of any party to the action, except that after it was made the defendants could no longer claim that there was a varience between the allegations and the proof with respect to that part of the agreement.

The other amendment related to that part of the agreement at Steubenville which provided that, besides the liens, the defendants would protect the plaintiff against, and would pay off, an open account which the Mack Company

then held against the plaintiff. (Record 57.) The purpose of this amendment also was to conform the declaration to the evidence.

This case was originally brought in the state court and was removed by the defendants to the Circuit Court of the United States. Under the act of Congress, it is doubtful whether any difference is to be made, with respect to matters of practice, between cases which are originally brought in the federal courts and those which are removed from the state courts. In both classes of cases, but more especially in the latter, the practice in the federal courts is regulated by the state law, whether that law be found in statutes regulating the practice or in decisions of the state courts ascertaining rules of practice. This proposition is not without its exception, as in the instance of refusals of motions for new trials and exceptions based thereon, but in general it is an established and well recognized rule. Thus in the case of *Smale v. Mitchell*, 145 U. S. 99, a statute of Illinois provided that a party to an action of ejectment against whom a judgment and verdict had been rendered might have a new trial as a matter of right and without showing cause. It was held that the practice in the federal courts sitting in Illinois must conform to this statutory rule. In *Amy v. Watertown*, 130 U. S. 301, the federal court felt itself bound to follow the statutes and practice of Wisconsin with respect to the method in which process should be served. But it is unnecessary to multiply authorities upon this well established proposition.

The Code of West Virginia, chapter 125, section 12, provides as follows: "The plaintiff may of right amend his declaration or bill at any time before the appearance of the defendant, or after such appearance if substantial justice will be promoted thereby. But if such amendment be made after the appearance of the defendant, the court may impose such terms upon the plaintiff as to a continuance of the cause, and the payment of the costs of such continuance, as it may deem just."

And in chapter 131, section 8, is the following provision: "If at the trial of any action there appear to be a variance

between the evidence and allegations or recitals, the court may, if in its opinion substantial justice will be promoted thereby, allow the pleading to be amended, and if it be made to appear that a continuance of the cause is thereby rendered necessary, such continuance shall be granted at the costs of the party making the amendment."

In the statute regulating the trial in the Circuit Court of appeals from justices, found in chapter 50, section 169, there is the like provision, almost in the same language: "The appeal may be tried upon the pleadings made up in the justice's court, or the pleadings may be amended before or during the trial of the appeal, when substantial justice will be promoted by amendment. If the amendment be made during the trial of the appeal, and it be made to appear to the satisfaction of the court that a continuance of the cause is necessary in consequence of such amendment, a continuance shall be granted, and the court may in its discretion require the party making the amendment to pay the costs of the continuance."

These provisions of the law have always been applied with the utmost liberality and indulgence in favor of the allowance of amendment. The only limitation upon this liberality is that under which the defendants in the case vainly seek shelter. The court will not allow the plaintiff, either before or during the trial, to amend his declarations so as to insert in it a cause of action entirely different from that originally declared upon. This qualification, however, does not mean merely that the contract described in the amendment and the contract in the original declaration are different. It is because there is a difference between them that the amendment has become necessary, and such a difference must exist whenever an amendment is made to cure a variance. The limitation means no more than that the plaintiff shall not, under pretence of an amendment, depart entirely from the cause of action upon which he originally relied, and attempt in this manner to bring a new suit against the defendant.

In the present case the plaintiff sued upon the contract made at Steubenville. The cause of action was that con-

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not further than necessary
caution in this case.

tract and the breach of it. It is possible that in the case of a contract for payments falling due at different times, or in the case of any other contract of a continuing nature, several and successive causes of action might arise by reason of as many breaches, and that the plaintiff might sue for the first breach and not be barred from a subsequent action on a second breach which had not occurred at the bringing of his first suit. Even in such cases, however, the plaintiff would have to sue for all breaches of the contract which had occurred previous to the time of his instituting his suit, or be barred with respect to any for which he should not sue. In the case of ordinary contracts, not having this feature of continuance, there can be but one recovery. The contract may be broken in various different ways, and these various ways should properly be set up in the declaration in assigning the breaches of the contract. It cannot be said, however, that every breach constitutes a separate cause of action. On the contrary, if the defendant should have committed two breaches before the plaintiff should bring his suit, and the plaintiff should sue for or recover only one, he would nevertheless be barred from bringing a subsequent action for the other.

Now in the case at bar so far as the contract was concerned, it was a single contract, made at Steubenville, and containing various provisions. Looking at it alone, it can not be said that each of its provisions constituted a separate cause of action, so that there was one cause of action for the promise to pay the liens, and another cause of action for the promise to pay the open account. There were not two contracts, one relating to each of these subjects, but a single contract relating to the several matters. Turning from the contract and looking at the breaches of it, it cannot be said that the several breaches constituted several causes of action. They had all taken place before the plaintiff brought his suit, and what the plaintiff had was a single cause of action for the several breaches which had taken place. He could sue for all of them at once, and he must do so or be barred with respect to any which might not be included in his suit.

The amendment in this particular, therefore, did not bring into the suit any new cause of action, but only another part of a cause of action which was already before the court. It was in no sense a departure from the claim which the plaintiff originally made, but an addition to it of matter which was strictly in the line of the original.

The case of *Clark v. Railway Company*, 39 W. Va. 732, is entirely analogous to the case at bar in this particular, and illustrates the manner in which the state court applies the statutes. In that case Clarke brought an action against the railway company to recover damages for its failure to build certain fences and put in certain cattle-guards on lands of the plaintiff through which the railway company had condemned a strip for its road. After the original declaration had been filed, describing these fences and cattle-guards with respect to which the claim was then made, the plaintiff filed an amended declaration alleging a failure to put in other and different fences and guards, in addition to those described in the original declaration. This was objected to on the same ground which is urged in the case at bar, that a new cause of action was being introduced into the declaration. It was said that the original suit was for a given number of fences and cattle-guards which constituted a distinct cause of action, while the amendment was for other and additional fences and guards with respect to which the plaintiff had a distinct cause of action. The court declined to take this view, saying that the cause of action arose from a single duty upon the part of the railway company to put up the whole number of cattle-guards and fences. "When there are several breaches of one contract or duty, he must in one action sue for all. The land-owner cannot sue now for failure to build one crossing here, and recover, and then bring another suit for a failure to bring another there, on the same land. * * * Any amendment is allowable so it does not bring in a substantive cause of action foreign to the case as made by the original declaration,—one having in itself a separate existence from that named in the original declaration." See also *Kuhn v. Brownfield*, 34 W. Va, 252.

Turner v. Woodruff 8 McLean 180. 148 goes much further than necessary for our position in this case.

## THE REFUSAL OF THE COURT TO GRANT A CONTINUANCE AFTER THE DECLARATION HAD BEEN AMENDED.

This is not reviewable by the C.C.A. Richmond Ry. v. Dietz 3 CCA. 1

After these amendments were made the defendants moved the court to grant them a continuance of the cause, on the ground that the making of the amendments gave them a right to the continuance. (Record 57.) They made no showing whatever that they were in any way surprised by the making of the amendments, or that they were any less ready for the trial of the case than they had been before. Indeed it is obvious from a considration of the whole case that the defendants did not need a continuance and were making their motion solely for the purpose of delay. Every person who was present at the making of the Steubenville contract was upon the witness stand during the trial of the case, and no one else could possibly have had any direct knowledge of the matters to which the amendments related. The defendants had not objected to the introduction of the proof of the matters covered by these amendments, although that proof had been introduced before the amendments were made. The defendants in fact met this proof by the denials of Boren and Lance, and there is no suggestion that they had any other way to meet it.

The question to be considered therefore, is whether, when such an amendment is made the defndants have an absolute right to a continuance for the sole reason that the amendment has been allowed and without any showing that a continuance is necesary to their protection. The defendants rely upon the language of the court in *Travis v. Insurance Company*, 28 W. Va. 583, 595, which is as follows: "These authorities sufficiently show that the circuit courts of this state in the exercise of their general common-law jurisdiction, in the absence of any statute prohibiting them from doing so, an independently of any statute authorizing them to do so, may in their discretion permit the pleadings to be amended at any time before verdict found, wherever justice will be promoted thereby without injury to the opposite party; but in every such case if the opposite party requests it the jury should be discharged, the opposite party allowed

to amend his pleadings or to plead anew to the pleadings so amended, and the cause continued." Taking this language by itself one might suppose that the court meant that on an amendment the opposite party is entitled to a continuance on his mere request and without any showing of cause. In that case, however, the language relied upon was entirely obiter. The question before the court was whether the amendment was properly allowed. The amendment was made during a trial which did not result in a verdict, and no question of continuance was presented to the court.

In a later case the same court had before it the statute which has been already quoted relating to the trial of appeals from justices, which in the particular under consideration is precisely the same as the statuate regulating the practice in cases brought originally in the circuit court, and the rule is laid down more nearly in accordance with the provisions of the statute. "If a party during trial of an appeal from justice is entitled to amend his pleadings, that right cannot be made to depend solely upon whether the adverse party is then ready to proceed with the trial. If such amendment would be a surprise to the other party, a continuance will obviate that objection." Powell v Love 86 Va. 96

The statute itself expresses the rule in language too plain for misconstruction: "*If it be made to appear* that a continuance of the cause is thereby rendered necessary, such continuance shall be granted." Surely it is for the party who desires the continuance to make it appear that the continuance is necessary. The case of *Bambergery v. Terry*, 103 U. S. 40, cited by the defendants themselves, (Brief 35), lays down a rule which is a sufficient answer to this assignment of error.

## THE VERDICT AND JUDGMENT ARE SAID TO INCLUDE DAMAGES NOT SUED FOR AND NOT INCLUDED IN THE AMENDED DECLARATION.

When one attempts to follow the defendants through the devious labyrinth by way of which they arrive at a conclusion of error in this regard, he feels as though he were being

led around Robin Hood's barn, and as though he needed the acuteness of that worthy outlaw's vision to enable him to see the point. The contract which was made at Steubenville provided that the defendants should pay the liens and the open account. The judgment of the Ohio court was for the plaintiff there, to the aggregate amount of the liens and the open account. The court sold certain stock and applied the proceeds as a credit on the judgment, thus leaving a balance due on the judgment. This balance was the foundation of the judgment in the circuit court of Hancock county, West Virginia, and was also the basis of the present suit. The claim of the defendants is, as we understood it, that so far as the Ohio judgment was based on the open account, the plaintiff in the present case had not sued upon it therefore that the present verdict and judgment were based in part on a claim not sued for. There are a good many answers, each of them sufficient, to this assignment of error.

If the amended declaration was bad because, after introducing the new matter relating to this open account, it failed to allege any breach with respect to the same, the defendants ought to have demurred to it for that reason. They did not do so. If the evidence with respect to the open account was inadmissible because there was nothing in the declaration to which it related, the defendants ought to have objected to the evidence. They did not do so.

The evidence which was introduced, and introduced without objection, established the plaintiff's right to the verdict whether that included the open account or did not include it, and judgment which was rendered upon it in the court below. But if the defendants thought that the verdict and judgment were not warranted by the evidence which was introduced, advantage could be taken of that state of affairs only by a motion for a new trial on the ground that the verdict was contrary to the evidence. They made a motion for a new trial, that motion was overruled by the court, and the defendants excepted. It is well settled, however, that this court will not review the action of the trial court in refusing a new trial on the ground that the verdict was contrary to the evidence. *Fishburn v. Railway Company*, 137 U. S. 60. Ayres v. [illegible] Id. 584, 597. Refusal of new trial is not reviewable in Cir. Ct. App. Richmond Ry. Co. v. Dick, 3 CCA. 149; G.T.W.R.R. Co. v. Howard, 1 CCA. 221. Id. sits to review only errors of law, Hall v Houghton, 2 CCA. 661. R. S. § 1011, Desty § 514 provides there shall be no reversal for error of fact. The office of motion for new trial is limited to trial court. McMillan v. Pyeatt 1 CCA. 613, 615. Pleasant [illegible] 1 CCA. 615.

We do not see how the question which is sought to be raised under this exception can properly be ranged elsewhere than under one of the three heads, namely, that relating to the sufficiency of the declaration as a pleading, that relating to the admissibility of evidence, or, that relating to the impropriety of the verdict as being against the evidence.

But in order to make this point, the defendants found it necessary to tell us that the credit of fifty-seven hundred dollars allowed by the Ohio court was a credit on that part of the judgment which was based upon the liens, and not upon that part of the judgment which was based upon the open account. They also tell us that the Ohio judgment was an entirety. (Brief 51.) Upon looking at the Ohio record, it will be seen that the Ohio court, then having jurisdiction of the parties, applied this fifty-seven hundred dollars, not to the portion of the judgment based upon the liens, but to the judgment as an entirety. It was applied as much to the part based upon the open account as to that based upon the liens. The stock from which the credit was derived was, it is true, held as collateral for the liens, or rather for a note which was itself collateral for the lines. The court, however, did not apply it in that manner, but applied it, as as has been said, to the judgment as an entirety.

But the defendants are all wrong in supposing that the declaration did not proceed for this four hundred dollars open account, in so far as that account was the basis of the Ohio judgment. The cause of action on which this suit was brought was the contract which was made at Steubenville and the breach of that contract. The breach of that contract consisted in the procuring of the judgment by the Mack Company. *Mills v. Dow*, 133 U. S. 423. The Ohio judgment, which constituted the breach of the contract, was a judgment based upon both the liens and the open account. When that judgment was proved, the evidence of it showed that it was based upon these two things. Now the plaintiff's declaration as amended alleged the making of the contract at Steubenville, which related both to the liens and the open account. It then alleged a breach by reason of the procuring of the judgment in Ohio. The record of that judgment

was introduced without objection, and that judgment was based upon boh these liens and the open account Thus, contract and breach related to the same two things. In view of these facts, it seems idle to say that the verdict and judgment in the present case, for the amount of the Ohio judgment, was based in part upon anything which was not included in the plaintiff's claim. The plaintiff started out to recover the amount of the Ohio judgment, which was properly described in his declaration, and that is precisely what he has recovered. If there had been any failure of proof, it would be aided by the verdict, Lincoln v. Iron gation 1412; Plankerton v. Gray 11 CCA 268; Miner v. Mechi Bank

Throughout the trial of the case below, the defendants endeavored, in every conceivable way, to draw the minds of the court and jury from the real question at issue, and to envelope the case in a fog of irrelevant matter. Their effort in this court seems to have been to argue the merits of the case, the alleged contradictions in Porter's evidence, and inconsistencies between statements which he has made at different times, under pretense of arguing the precise assignments of error. It seems to us that the slightest attention to the real questions involved in the controversy will not fail to show to the impartial mind of the court the trifling nature of the exceptions which were taken in the court below, the unimportant character of the assignments of error, and the unsoundness of the arguments by which the defendants have sought to apply to their case inapplicable rules of law., and

WM. P. HUBBARD, and lead
HENRY M. RUSSELL, allow
Attorneys for Defendant in Error. of de

Wheeling, October 28th, 1895.

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# TRANSCRIPT OF RECORD.

## Supreme Court of the United States.

*October Term, 1895.*

*No.* 916.

JOHN M. MACK AND G. B. BOREN,
PLAINTIFFS IN ERROR,

*versus*

JOHN PORTER, DEFENDANT IN ERROR.

ON PETITION OF THE PLAINTIFFS IN ERROR FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

# TRANSCRIPT OF RECORD.

# United States Circuit Court of Appeals

## FOURTH CIRCUIT.

*No. 145.*

JOHN M. MACK AND G. B. BOREN,
PLAINTIFFS IN ERROR,

*versus*

JOHN PORTER, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA, AT WHEELING.

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# TRANSCRIPT OF RECORD.

THE UNITED STATES OF AMERICA, } To-wit:
DISTRICT OF WEST VIRGINIA. }

At a Circuit Court of the United States for the District of West Virginia, begun and held at the court-house in the City of Wheeling, on the first Monday of April, being the first day of the same month, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable John J. Jackson, Judge of the District of West Virginia.

Among other were the following proceedings, to-wit:

| | |
|---|---|
| John Porter, Plaintiff, *vs.* John M. Mack and G. B. Boren, Defendants. | At Law in Assumpsit. Removed from State Court. |

**RECORD FROM STATE COURT.**

Filed in open court and docketed Fall term at Clarksburg, October 3d, 1894.

Filed in open court and docketed Fall term at Martinsburg, October 15th, 1894, and transferred to Wheeling. Docketed at Spring term at Wheeling, April 1st, 1895, by the Circuit Court of the United States for the District of West Virginia.

WEST VIRGINIA:

Pleas and proceedings before Joseph R. Paull, presiding Judge of the Circuit Court for Hancock county, at the court-house of said county, on the 1st day of October, 1894, and in the 32d year of the State.

Be it remembered that heretofore, to-wit, on the 24th day of September, 1894, came John Porter, by his attorney, and sued out of the office of the clerk of the Circuit Court

for Hancock county aforesaid, a writ of summons in assumpsit against John M. Mack and G. B. Boren, which writ is in the words and figures following, to-wit:

## SUMMONS.

State of West Virginia, to the sheriff of Hancock county—
Greeting:

We command that you summon John M. Mack and G. B. Boren, if they be found in your bailiwick, to appear at the clerk's office of the Circuit Court of Hancock county, (2) at rules to be held for said court on the first Monday in October, 1894, to answer John Porter, on a plea of in assumpsit.

Damages $20,000.00. And have then there this writ.

Witness, A. W. Brown, clerk of said court, at the court-house of said county, the 24th day of September, A. D. 1894.

Teste:

A. W. BROWN,
Clerk Circuit Court H. C.

## AFFIDAVIT AND ATTACHMENT.

And on the same day in said clerk's office the said plaintiff filed his affidavit for an order of attachment in this action, and said order of attachment was issued by the clerk, which affidavit and order of attachment are in the words and figures following, to-wit:

### AFFIDAVIT.

AN ACTION OF ASSUMPSIT IN THE CIRCUIT COURT OF HANCOCK COUNTY.

John Porter, Plaintiff.
*vs.*
John M. Mack and G. B. Boren, Defendants.

STATE OF WEST VIRGINIA,
Hancock County, } *ss:*

Before A. W. Brown, clerk of the said court, this day in the clerk's office thereof, came John Porter, plaintiff in the above entitled cause and made oath in due form of law, that the plaintiff above named is justly entitled to recover in said action against the above named defendant the sum of fourteen thousand, eight hundred and forty-three 85-100 dollars, with interest thereon from the 2d day of February, 1893, until payment, and that the said claim is for the amount of a judgment rendered against the said John Por-

ter in the Common Pleas Court of Jefferson county, Ohio, in favor of Mack Manufacturing Company—$14,772.27-100 (3) on the 2d day of February, 1893, with interest and costs thereon, for which the said defendants are liable, and that the defendant, John M. Mack, is not a resident of the State of West Virginia, and that the material facts upon which the said plaintiff rel to show the existence of the grounds upon which this application for an attachment in this action is based, are as follows, viz:

JOHN PORTER.

Taken, sworn to and subscribed before me and given under my hand this 24th day of September, 1894.

A. W. BROWN,
Clerk.

## ORDER OF ATTACHMENT.

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA.

| | |
|---|---|
| John Porter, Plaintiff,<br>*vs.*<br>John M. Mack and G. B. Boren,<br>Defendants. | Order of Attachment. |

The plaintiff in this case having filed the necessary affidavit as required by law, the constable of the county of Hancock, to whom this order shall come, is hereby required, in the name of the State of West Virginia, to attach the estate of the defendant sufficient to pay the sum of $14,843.85-000 dollars, with interest on $14,772.27-100 from the second day of February, 1893, until payment, and the costs of this suit, and make return of his proceedings under this order to the next term of the said Circuit Court of the county of Hancock.

Witness, A. W. Brown, clerk, this 24th day of September, A. D. 1894.

A. W. BROWN,
Clerk.

The plaintiff within named hereby designate Mack (4) Manufacturing Company as being indebted to the within named defendant, and as having in its possession effects of the within named defendant.

The within named plaintiff by

J. R. DONEHOO,
His Attorney.

The above named Mack Manufacturing Company is required to appear at the next term of the Circuit Court of Hancock county and disclose, on oath, in what sum it is indebted to the defendants, John M. Mack and G. B. Boren, and what effects of the defendants it has in its possession.

Witness, A. W. Brown, clerk, this 24th day of September, 1894.

A. W. BROWN,
Clerk.

And at another day to-wit: At rules held in the clerk's office of the said Circuit Court for Hancock county on the first Monday in October, 1894, being the first day of October, 1894, came to the plaintiff, by his attorneys, and filed his declaration against the defendants, which declaration is in the words and figures following, to-wit:

## DECLARATION.

IN THE CIRCUIT COURT OF HANCOCK COUNTY.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

John Porter complains of John M. Mack and G. B. Boren of a plea of trespass on the case in assumpsit, and says that heretofore and before the making of the agreement by the said defendants as hereinafter set forth, (5) the said plaintiff had sold and conveyed to a corporation known by the name of the John Porter Company certain real estate in the said county, a portion of which was known as the Eagle Works, and another portion of which was known as the Ætna Works, and that at the time of such sale there was an indebtedness secured by a lien upon the said Eagle Works of about nine thousand dollars for which the said plaintiff was liable, which indebtedness was due to Mary A. Stuart and others, and on the said Ætna Works there was an indebtedness of about five thousand dollars similarly secured, and for which the said plaintiff was liable, which was due to one D. S. Silvers, and that after the said sale the said plaintiff remained liable upon both of the said indebtednesses, and that upon making the said sale to the said company the said plaintiff became and thereafter remained and continued liable to the said company to pay the said two indebtednesses last aforesaid, and thus to relieve the said company and the property which he had conveyed to it of liability with respect to the same.

The said plaintiff says that the said indebtednesses to the said Mary A. Stewart and others and the said D. S. Silvers were not due or payable at the time of his said sale to the said company, nor at the time of the making of the said agreement by the said defendants, as hereinafter set forth, but became due and payable before they were paid by the said company as hereinafter stated. The said plaintiff further says that at and after the said sale he was the owner of fifteen thousand dollars of the stock at par of the said John Porter Company, and that he pledged the said fifteen thousand dollars of stock to the said company to secure it against loss by reason of the said indebtednesses. The said plaintiff further says that at and before the time of (6) the making of the agreement by the said defendants, as hereinafter set forth, he was also the owner of seventy-one thousand dollars at its par value of other stock of the said company which had been pledged by him to secure an indebtedness to the Exchange Bank of Wheeling, and which was at the time of the making of the said agreement held by the bank for that purpose. And the said plaintiff says that at the time of the making of the said agreement by the said defendants, as hereinafter set forth, the said defendant, John M. Mack, held a note of the said plaintiff on which there was a balance due of about four thousand dollars. And the said plaintiff says that the said stock so owned by him, as aforesaid, in the said company was, at the time of the making of the said agreement, of great value, to-wit, of the value of eighty-six thousand dollars. And the said plaintiff says that on a certain day, to-wit: on the first day of December, in the year 1892, at the said county, the said defendants in consideration of the agreement of the plaintiff then made that the seventy-one thousand dollars of stock held by the said Exchange Bank should be sold to the said John M. Mack for the sum of forty-one thousand dollars, which sale was then and there accordingly made, and in further consideration of the agreement of the plaintiff then made that the said fifteen dollars held by the said John Porter Company should belong absolutely to the said company, the said defendants undertook and agreed to and with the said plaintiff that they would assume and they did thereby assume the said indebtedness for about nine thousand dollars due to the said Mary A. Stewart and others, and the said indebtedness of about five thousand dollars due to the said D. S. Silvers, and then and there further agreed that they would pay off and discharge the said indebtedness due to the said Mary A. (7) Stewart and others and the said indebtedness due to the said D. S. Silvers when and as the said debts should

The above named Mack Manufacturing Company is required to appear at the next term of the Circuit Court of Hancock county and disclose, on oath, in what sum it is indebted to the defendants, John M. Mack and G. B. Boren, and what effects of the defendants it has in its possession.

Witness, A. W. Brown, clerk, this 24th day of September, 1894.

A. W. BROWN,
Clerk.

And at another day to-wit: At rules held in the clerk's office of the said Circuit Court for Hancock county on the first Monday in October, 1894, being the first day of October, 1894, came to the plaintiff, by his attorneys, and filed his declaration against the defendants, which declaration is in the words and figures following, to-wit:

## DECLARATION.

IN THE CIRCUIT COURT OF HANCOCK COUNTY.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

John Porter complains of John M. Mack and G. B. Boren of a plea of trespass on the case in assumpsit, and says that heretofore and before the making of the agreement by the said defendants as hereinafter set forth, (5) the said plaintiff had sold and conveyed to a corporation known by the name of the John Porter Company certain real estate in the said county, a portion of which was known as the Eagle Works, and another portion of which was known as the Ætna Works, and that at the time of such sale there was an indebtedness secured by a lien upon the said Eagle Works of about nine thousand dollars for which the said plaintiff was liable, which indebtedness was due to Mary A. Stuart and others, and on the said Ætna Works there was an indebtedness of about five thousand dollars similarly secured, and for which the said plaintiff was liable, which was due to one D. S. Silvers, and that after the said sale the said plaintiff remained liable upon both of the said indebtednesses, and that upon making the said sale to the said company the said plaintiff became and thereafter remained and continued liable to the said company to pay the said two indebtednesses last aforesaid, and thus to relieve the said company and the property which he had conveyed to it of liability with respect to the same.

The said plaintiff says that the said indebtednesses to the said Mary A. Stewart and others and the said D. S. Silvers were not due or payable at the time of his said sale to the said company, nor at the time of the making of the said agreement by the said defendants, as hereinafter set forth, but became due and payable before they were paid by the said company as hereinafter stated. The said plaintiff further says that at and after the said sale he was the owner of fifteen thousand dollars of the stock at par of the said John Porter Company, and that he pledged the said fifteen thousand dollars of stock to the said company to secure it against loss by reason of the said indebtednesses. The said plaintiff further says that at and before the time of (6) the making of the agreement by the said defendants, as hereinafter set forth, he was also the owner of seventy-one thousand dollars at its par value of other stock of the said company which had been pledged by him to secure an indebtedness to the Exchange Bank of Wheeling, and which was at the time of the making of the said agreement held by the bank for that purpose. And the said plaintiff says that at the time of the making of the said agreement by the said defendants, as hereinafter set forth, the said defendant, John M. Mack, held a note of the said plaintiff on which there was a balance due of about four thousand dollars. And the said plaintiff says that the said stock so owned by him, as aforesaid, in the said company was, at the time of the making of the said agreement, of great value, to-wit, of the value of eighty-six thousand dollars. And the said plaintiff says that on a certain day, to-wit: on the first day of December, in the year 1892, at the said county, the said defendants in consideration of the agreement of the plaintiff then made that the seventy-one thousand dollars of stock held by the said Exchange Bank should be sold to the said John M. Mack for the sum of forty-one thousand dollars, which sale was then and there accordingly made, and in further consideration of the agreement of the plaintiff then made that the said fifteen dollars held by the said John Porter Company should belong absolutely to the said company, the said defendants undertook and agreed to and with the said plaintiff that they would assume and they did thereby assume the said indebtedness for about nine thousand dollars due to the said Mary A. Stewart and others, and the said indebtedness of about five thousand dollars due to the said D. S. Silvers, and then and there further agreed that they would pay off and discharge the said indebtedness due to the said Mary A. (7) Stewart and others and the said indebtedness due to the said D. S. Silvers when and as the said debts should

respectively become due and payable, and that the said plaintiff should never be sued for either of the said indebtedness last aforesaid, but that he was then and there free from the same and from all liability to the said Mary A. Stewart and others, or to the said D. S. Silvers, or to the said John Porter Company, by reason of the said indebtedness last aforesaid, or either of them. And the said plaintiff says at the same time and place the said defendants also undertook and agreed to and with the said plaintiff that the said note of the said plaintiff held by the said John M. Mack, on which about four thousand dollars remained due, should be cancelled and returned to the said plaintiff. And the said plaintiff says that the said indebtedness to the said Mary A. Stewart and others, and the said indebtedness to the said D. S. Silvers afterwards, to-wit: on the first day of January, in the year 1893, became due and payable, but that the said defendants, not regarding their said promise and undertaking, but contriving and intending to injure the said plaintiff and to subject him to loss and damage, did not perform their said agreement, and did not on the said first day of January in the year 1893, when the said indebtedness last aforesaid became due and payable, nor within a reasonable time thereafter, nor at any time, pay the said indebtedness due the said Mary A. Stewart and others as aforesaid, nor the said indebtedness due to the said D. S. Silver, but therein wholly failed and made default. And the said plaintiff says that afterwards, to-wit: on the second day of January in the year 1893, the said John Porter Company (whose name has since the date last aforesaid and before the commencement of this suit been changed by proper proceedings to Mack Manufacturing Company) itself paid off and discharged (8) the said indebtedness to the said Mary A. Stewart and others and the said indebtedness to D. S. Silvers. And afterwards, to-wit: on the day and year last aforesaid, instituted a suit at law in the Common Pleas Court in Jefferson county, in the State of Ohio, against the said plaintiff for the enforcement of the said plaintiff's liability to the said John Porter Company by reason of the said company's having paid off and discharged the said two indebtednesses last aforesaid, and for the recovery from the said plaintiff of the amount paid by it in paying off and discharging the same, and that in the said suit such proceedings were had that afterwards, to-wit: on the second day of February in the year 1893, in the said Court of Common Pleas the said John Porter Company recovered a judgment against the said plaintiff for the sum of fourteen thousand seven hundred and seventy-two dollars and twen-

ty-seven cents, with interest thereon from the thirty-first day of January in the year 1893, and sixty-six dollars and seventy-four cents costs, the said sum of fourteen thousand seven hundred and seventy-two dollars and twenty-seven cents being the amount paid by the said company to discharge the said two indebtednesses last aforesaid with interest thereon from the time of such payment until the time of the judgment aforesaid. And the said plaintiff says that the bringing of the said suit by the said company and the recovery of the said judgment and the failure of the said defendants to pay the said two indebtednesses as aforesaid constituted a breach of the said agreement so made as aforesaid by the said defendants. And the said plaintiff says that the said defendants afterwards, to-wit: on the day and year last aforesaid, at the said county, had notice of all of the said premises. And the said plaintiff says that the said defendant thereby became liable to pay to the said plaintiff the said sum of fourteen thousand seven hun-
(9) dred and seventy-two dollars and twenty-seven cents with interest from the said thirty-first day of January in the year 1893, and the said sixty-six dollars and seventy-four cents cost. And being so liable the said defendants afterwards, to-wit, on the said 2d day of February, in the year 1893, at the said county, undertook and promised the said plaintiff to pay him the said sum of fourteen thousand seven hundred and seventy-two dollars and twenty-seven cents and the said interest, and the said sixty-six dollars and seventy-four cents costs, when they, the said defendants, should be thereunto requested. Yet the said defendants, although often requested so to do, have not as yet paid to the said plaintiff the said sum of fourteen thousand seven hundred and seventy-two dollars and twenty-seven cents, or the said interest, or the said sum of sixty-six dollars and seventy-four cents, or any part of either, but to pay the same have hitherto wholly neglected and refused, and still do neglect and refuse. And for an assignment of special damage by reason of the premises the said plaintiff says that afterwards, to-wit, on the day of April, in the year 1894, the said Mack Manufacturing Company brought an action at law in the said Circuit Court of Hancock county to recover of and from the said plaintiff a judgment for the amount of the said judgment so rendered as aforesaid by the said Court of Common Pleas, and that afterwards, to-wit: at the term of the said Circuit court of Hancock county the said Mack Manufacturing Company recovered a judgment in the said action against the said plaintiff and caused execution to issue thereon and to be levied upon certain property of the said plaintiff

in the said county of Hencock to the damage of the said plaintiff, $20,000. And, therefore, the said plaintiff brings his suit, &c.

DONEHOO, HUBBARD, RUSSELL.

## BILL OF PARTICULARS.

(10) Filed With Declaration.

JOHN M. MACK AND G. B. BOREN,
DEBTORS,

TO JOHN PORTER.

| | | | |
|---|---|---|---|
| 1893, Feb. 2. | To amount of judgment in Common Pleas Court of Jefferson county, rendered against the plaintiff in favor of the Mack Manufacturing Company, | $14,772 | 27 |
| " " | Interest from Jan. 31, 1893, to Feb. 2, 1893, | 4 | 84 |
| " " | Costs, | 66 | 74 |
| | | $14,843 | 85 |

Interest will be claimed until payment.

And on the same day, to-wit: At a Circuit Court for the said county of Hancock, at the court-house of said county, on the 1st day of October, 1894, among other, the following proceedings were had:

## ORDER OF STATE COURT ON PETITON FOR REMOVAL TO UNITED STATES COURT.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

This 1st day of October, A. D. 1894, came the said defendants and filed their petition, duly verified, praying for the removal of this cause to the Circuit Court of the United States for the District of West Virginia, together with a bond, with good and sufficient sureties for their entering in such Circuit Court of the United States on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the last named Circuit Court, if said court shall hold that that this suit was wonderfully or improperly removed thereto, and said bond having been acknowledged in open court by

the parties thereto, and the sureties therein being approved (11) by the court as sufficient, it is ordered by the court that said petition and bond be and they are hereby accepted by this court, and that this court will proceed no further in this suit.

Which petition and bond, the affidavits therewith filed this day, and the certificates thereto, are in the words and figures following, to-wit:

## PETITION FOR REMOVAL FROM THE STATE COURT TO THE CIRCUIT COURT OF THE UNITED STATES.

Filed in State Court October 1st, 1894.

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA.

John Porter, Plaintiff,
*vs.*
John M. Mack and G. B. Boren, Defendants. } In Assumpsit.

To the Honorable Circuit Court of Hancock County, West Virginia:

Your petitioner, John M. Mack and G. B. Boren, respectfully show that they are the defendants in the above entitled suit, and that they are both non-residents of the State in which said suit was brought, to-wit: the said State of West Virginia; and that the matter and amount in dispute in the said suit exceeds, exclusive of interest and costs, the sum of value of two thousand dollors.

That the said suit is of a civil nature, and that it is an action at law in assumpsit instituted in the said Circuit Court of Hancock county, in the State of West Virginia, on the 24th day of September, 1894, by said John Porter as plaintiff, against your petitioners as defendants, in which the writ of summons is returnable to October rules, 1894, (12) and the damages claimed are twenty thousand dollars.

That the controversy in the said suit is wholly between citizens of different States, to-wit: between your said petitioners (who aver that your petitioner, John M. Mack, one of the defendants in the above entitled suit, was at the time of the commencement of the said suit, has ever since been and still is, a resident of and a citizen of the city of Philadelphia, of the county of Philadelphia, and of the State of Pennsylvania, and a non-resident of the State of West Virginia, and that your petitioner, G. B. Boren, the other defendant in the above entitled suit, was at the time of the commencement of the said suit, has ever since been and still

is, a resident of and a citizen of the city of Steubenville, of the county of Jefferson and of the State of Ohio, and a non-resident of the State of West Virginia) and the said plaintiff, John Porter, who, as your petitioners aver, was at the time of the commencement of the said suit, has ever since been and still is, a resident of and a citizen of the said county of Hancock, and of the State of West Virginia. And your petitioners offer herewith a bond, with good and sufficient surety, for their entering in the Circuit Court of the United States for the District of West Virgihia, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners pray this honorable court to proceed no further therein, except to make an order for the removal of this cause to said Circuit Court of the United States, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of (13) the United States in and for the District of West Virginia, and they will ever pray.

JOHN M. MACK,
G. B. BOREN,
Petitioners.

CALDWELL & CALDWELL,
Attorneys for the Petitioners.

STATE OF WEST VIRGINIA, County of Hancock, } To-wit:

G. B. Boren, one of the petitioners named in the above petition for removal, being duly sworn, on his solemn oath says that he is such petitioner, that he has read and knows the contents of said petition, and that the statements and allegations therein contained are true.

G. B. BOREN.

Taken, subscribed and sworn to before me by said G. B. Boren, in open court, this first day of October, A. D. 1894.

A. W. BROWN,
Clerk of the Circuit Court of Hancock County,
West Virginia.

STATE OF WEST VIRGINIA County of Hancock, } To-wit:

I, George B. Caldwell, being duly sworn, do say that

I am a member of the firm of Caldwell & Caldwell, the attorneys for the petitioners in the cause in the foregoing petition mentioned, that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true.

GEORGE B. CALDWELL.

Subscribed by the said George B. Caldwell in my presence, and by him sworn to before me in open court, this first day of October, 1894.

A. W. BROWN,
Clerk Cir. Court Hancock Co., W. Va.

**BOND.**

(14) Filed in State Court October 1st, 1894.

Know all men by these presents, that we, John M. Mack and G. B. Boren, as principals, and A. S. Cooper and S. B. Farrar, as sureties, are held and firmly bound unto John Porter in the penal sum of one thousand dollars, for the payment whereof, well and truly to be made unto the said John Porter, his heirs, representatives and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said G. B. Boren and John M. Mack having petitioned the Circuit Court of Hancock county, State of West Virginia, for the removal of a certain cause therein pending, wherein said John Porter is plaintiff, and said G. B. Boren and John M. Mack are defendants, to the Circuit Court of the United States, in and for the District of West Virginia.

Now, if the said G. B. Boren and John M. Mack shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals, this first day of October, A. D. 1894.

JOHN M. MACK, [Seal.]
G. B. BOREN, [Seal.]
A. S. COOPER, [Seal.]
S. B. FARRAR, [Seal.]

(15) **QUALIFICATION OF SURETIES.**

STATE OF WEST VIRGINIA, }
Hancock County, W. Va. }

A. S. Cooper and S. B. Farrar, of said county, the sureties named in the foregoing bond, being duly sworn, do depose and say that they are residents of the State of West Virginia, and are property holders therein; and that they are worth the sum of one thousand dollars over and above all the debts and liabilities of each of them and exclusive of property by law exempt from execution, that they have property in the State of West Virginia, liable to execution, of the value of more than one thousand dollars.

Signed A. S. COOPER,
S. B. FARRAR.

Subscribed in my presence by A. S. Cooper and S. B. Farrar, and by them sworn to before me, this first day of October, A. D. 1894, in my office, in the court-house of Hancock county, West Virginia. And bond approved and accepted.

A. W. BROWN,
Clerk Cir. Ct. of Hancock Co., West Va.

(16) **CERTIFICATE OF CLERK OF STATE COURT TO COPY OF RECORD FROM THAT COURT, &c.**

STATE OF WEST VIRGINIA, }
County of Hancock, } To-wit:

I, A. W. Brown, clerk of the Circuit Court of Hancock county, in the State of West Virginia, do hereby certify that the foregoing is a true transcript from the records and judicial proceedings of the said court, and contains the record and proceedings in a certain action in assumpsit lately pending in the said court between John Porter, plaintiff, and John M. Mack and G. B. Boren, defendants, with all things touching the same, as fully and wholly as they exist among the records and proceedings of the court aforesaid.

Seal.

In testimony whereof I hereunto set my hand and annex the seal of said court, at the court-house in New Cumberland, this first day of October, A. D. 1894.

A. W. BROWN,
Clerk Circuit Court,
Hancock Co., West Va.

WEST VIRGINIA,
Hancock County, } To-wit:

I, Joseph R. Paull, presiding judge of the Circuit Court of Hancock county, in the State of West Virginia, do certify that A. W. Brown, who hath given the preceding certificate, is clerk of the said court, and that his attestation is in true form. Given under my hand this first day of October, A. D. 1894.

JOSEPH R. PAULL.

WEST VIRGINIA,
Hancock County. } To-wit:

I, A. W. Brown, clerk of the Circuit Court of Hancock county, do hereby certify that Joseph R. Paull, who hath given the preceding certificate, is the presiding judge of the said court, and that his foregoing attestation is in due form.

{ Seal. }

Given under my hand and the seal of the said court this first day of October, A. D. 1894.

A. W. BROWN,
Clerk Circuit Court,
Hancock Co., W. Va.

Endorsements made by the clerk of the United States (17) Circuit Court for the District of West Virginia on the foregoing copy of the record from the State Court (the Circuit Court of Hancock county, West Virginia.)

"Filed in open court, and docketed at fall term, Clarksburg, October 3d, 1894.

L. B. DELLICKER,
Clerk.

Filed in open court and docketed fall term at Martinsburg, October 15th, 1894, and transferred to Wheeling.

L. B. DELLICKER,
Clerk.

Docketed at Wheeling this first day of April, A. D. 1895.

L. B. DELLICKER,
Clerk.

## PLEA, JOINING OF ISSUE AND IMPANELLING JURY.

Monday, April 15th, 1895.

UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF WEST VIRGINIA.

Present: The Honorable John J. Jackson, Judge of the United States District Court for the District of West Virginia, and one of the judges of this court.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

This day came the parties and their attorneys, and the defendants for plea say that they did not assume and promise, as the plaintiff in his declaration against them hath alleged, and of this they put themselves upon the country, and the plaintiff doth the like, and thereupon came a jury, to-wit: Nelson Noble, John Minkemeyer, G. F. Taylor, James Collins, James V. Dickey, J. D. McFadden, R. Donahue, J. D. Maxwell, Robert Pekari, D. McDonough, Edward Gillies, and P. B. Dobbins, twelve good and lawful men, who were selected, tried and sworn as the law directs to well and truly try the issue joined in this cause, and a true verdict render according to the law and the evidence, who having heard a portion of the evidence, and there not being time to hear the more thereof before the adjournment of the court, were adjourned until to-morrow morning at 9:30 o'clock.

## ORDER ADJOURNING JURY AND TRIAL.

(18) Tuesday, April 16th, 1895.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

This day came again the parties and their attorneys, and the jury which was empanelled and sworn on yesterday to try the issue joined in this cause appeared pursuant to their adjournment, and having heard another portion of the evidence, and not having time to complete the same before the adjournment of the court, were adjourned until to-morrow morning at 9:30 o'clock.

## ORDER FURTHER ADJOURNING JURY AND TRIAL.

Wednesday, April 17th, 1895.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

This day came again the parties and their attorneys, and the jury which was empanelled and sworn on Monday to try the issue joined in this cause appeared pursuant to their adjournment, and having heard the remainder of the evidence, and a portion of the arguments of counsel, and not having time to complete the same before the adjournment of the court, were adjourned until to-morrow morning at 9:30 o'clock.

## VERDICT, JUDGMENT ORDER AND MOTION FOR NEW TRIAL.

(19) April 18th, 1895.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

This day came again the parties, by their attorneys, and, the arguments of counsel having been fully heard, the jury retired to their chamber to consider of their verdict, and after a time returned into court and on their oath do say: "We, the jury, find for the plaintiff and assess his damages at ten thousand four hundred and forty-three dollars and sixty cents. P. B. Dobbins, Foreman."

Thereupon the defendants moved the court to set aside the said verdict and grant them a new trial, assigning in support of the said motion grounds in writing now filed. And the said motion having been submitted to the court is now by the court overruled, to which action of the court the defendants excepted. Thereupon, it is considered by the court that the plaintiff, John Porter, recover from the defendants, John M. Mack and G. B. Boren, the sum of ten thousand four hundred and forty-three dollars and sixty cents, the damages assessed by the jury as aforesaid, with interest thereon from this date until paid, and his costs about his suit in this behalf expended.

Thirty days is given the defendants to prepare and tender bills of exception.

## GROUNDS IN WRITING FOR NEW TRIAL.

(20) Filed in Open Court, April 18th, 1895.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

John Porter.
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

GROUNDS FOR A NEW TRIAL.

The defendants, John M. Mack and G. B. Boren, this 18th day of April, 1895, moved the court to set aside the verdict of the jury in said action and grant them a new trial therein, and assign in support of the said motion grounds in writing therefor which are now filed, as follows:

I.

Because the verdict aforesaid is contrary to the law and the evidence.

II.

Because the Circuit Court aforesaid sustained the objection of the plaintiff to the defendants being allowed to introduce testimony as offered by the witness, J. N. Vance, that the original notes and writing also offered in evidence in this connection, from which the contract between the Exchange Bank of Wheeling, and John M. Mack, of the 2d day of December, 1891, (which had been put in evidence,) was prepared, were originally prepared on the sheets marked 1 and 2 by Mr. A. J. Clarke, attorney for the Exchange Bank of Wheeling: that said notes as originally prepared were as follows:

"Agreement made this 2d day of Dec., 1891, between (21) The Exchange Bank of Wheeling, of the City of Wheeling, W. Va., of the 1st part, and John M. Mack, of the City of Phila., Penna., of the 2d part—witnesseth:

Said bank agrees to sell to said Mack, who agrees to buy, 710 shares of the capital stock of "The John Porter Company" (incorporated) of New Cumberland, W. Va., now standing in the name of John J. Jones, trustee, for the sum of $41,000.00, to be paid as follows: $5,000.00 in cash; $5,000 in 30 days; $10,333 in 6 months; $10,333 in 12 months, and $10,334 in 18 months from this date—for the deferred payments notes or accepted drafts to be given with interest.

Upon the payment of the said $5,000 in cash, sd. bank

will transfer and deliver to said Mack 50 shares of said stock. Upon the payment of the said $5,000 and int. in 30 days, and of the said $10,333 in 6 months and int., said bank will transfer and deliver to said Mack 220 shares; upon the payment of $10,000 and int., in 12 months, said bank will transfer and deliver to said Mack 220 shares; and upon the payment of $10,334 and int. in 18 months, said bank will transfer to sd. Mack 220 shares, the residue of said 710 shares hereinbefore sold.

It is agreed that in the event that said Mack desires an extension of the payment of said $10,334, due in 18 months, said bank will extend the payment thereof for 6 months longer, said Mack paying interest therefor, and said bank retaining as collateral thereto said residue of stock.

Said Mack shall at any stockholders meeting of sd. Co. have the right to control the vote of the said stock so transferred to said bank (standing in the name of said John J. Jones, trustee,) and a proper proxy, from time to time, (22) will at his request be executed to carry out the said intention.

Said Mack shall have the right to anticipate the time of the payment of any of said deferred installments, interest to cease on the said installments when so paid, and stock to be then transferred as hereinbefore provided.

Witness the following signatures:

John J. Jones, trustee, in whose name said 710 shares of stock stand, in consideration of the foregoing agreement, agrees to carry out the same, he here declaring that he holds said stock for the use and benefit of said "The Exchange Bank of Wheeling," this 2d day of Dec. 1891."

That the said notes were submitted through Mr. De Haven Lance on the day they were prepared, the 2d of December, 1891, to Alfred Caldwell as attorney for Mr. John M. Mack, and that the additions were made in pencil by Mr. Caldwell in his own handwriting, as shown on page 3; that the said addition are as follows:

"Said bank hereby agrees to immediately have said 710 shares transferred to it upon the books of The John Porter Company by a transfer made and signed by John J. Jones, trustee, in whose name they now stand.

Should said Mack desire to substitute before its maturity for said note for $10,333 and int. at six months, a note falling due at the same date with security thereon satisfactory to said bank, the said bank will accept said substitute note and surrender the said $10,333 note at six

months first mentioned and transfer to the said Mack 220 (23) of said shares, provided the $5,000 and int. at 30 days aforesaid have been paid."

That said agreement was written on the typewriter in Mr. Caldwell's office from the notes prepared by Mr. Clarke, as amended by Mr. Caldwell, and after having been transcribed upon the typewriter were signed by Mr. J. N. Vance for The Exchange Bank of Wheeling and by Mr. Lance for Mr. Mack.

III.

Because said Circuit Court overruled the objection of the defendants to the plaintiff, being permitted to amend his declaration, and permitted the plaintiff to make such amendment thereto after the words therein, "that the said fifteen thousand dollars held by the said John Porter Company should belong absolutely to the said company," by inserting therein the following

AMENDMENT:

"And in further consideration that the plaintiff should sell to the defendant, Boren, and the said defendant, Boren, should purchase from the plaintiff $15,000 of stock of the said John Porter Company at the price of sixty-five cents on the dollar."

IV.

Because said court overruled the objection of the defendants to the plaintiff being permitted to again amend his declaration, and permitted plaintiff to again amend the same by inserting therein after the words therein, "the said defendants also undertook and agreed to and with the said plaintiff that the note of the said plaintiff held by the said John M. Mack, on which about four thou- (24) sand dollars remained due, should be cancelled and returned to the said plaintiff," the following

AMENDMENT:

"and the said defendants also undertook and agreed to and with the said plaintiff that an indebtedness of the plaintiff to the said John Porter Company on an open account, the amount of which was not then definitely known, should be cancelled, and that the said defendants would pay off the same, and that the plaintiff should never be sued therefor, but was then and there free from the same."

V.

Because the said court denied and overruled the motion of defendants for continuance, because said amendments having been made, they were entitled to such continuance on account thereof.

VI.

Because the said Circuit Court sustained the objection of the plaintiff's counsel to the question by defendants' counsel: "At whose solicitation?" referring to the commencement of negotiation for the sale of stock to the defendant, John M. Mack, and in the court ruling that what occurred between Mr. Vance and Mr. Lance in the commencement of the negotiation for the purchase of this stock, Mr. Lance being the agent of Mr. Mack, could not be admitted as evidence, in the absence of Mr. Porter.

VII.

Because the court sustained the objection of the plaintiff to the defendants being allowed to prove, as they offered by the witness G. B. Boren, that after the sale was made at Philadelphia, and before December 1st, 1891, Mr. (25) Mack, in the hearing of this witness, offered to Mr. John Porter to restore the stock sold at Philadelphia to John Porter if he would pay the amount of the debt which John Porter owed to him, Mr. Mack.

VIII.

Because the court sustained the objection of the plainto the question by counsel for defendants to the witness G. B. Boren:

"State whether or not you heard any further notice given to him (the plaintiff, John Porter) by Mr. Mack."

IX.

Because the court sustained the objection of the plaintiff to the admission of proof by the witness, G. B. Boren, that on the day before the sale of stock in Philadelphia, Mr. Mack gave notice to John Porter at New Cumberland that he had better go to that sale and protect his interest the next day; that that stock would be sold, and that this occurred in the hearing of this witness.

X.

Because the court sustained the objection of the plaintiff to proof being admitted, as offered by the defendants by the witness, G. B. Boren, that before the stock sold in

Philadelphia was advertised for sale, the notes endorsed by Mr. Mack were sent by him to Mr. Boren at New Cumberland, West Virginia, with the request to see Mr. John Porter and ask him to settle this thing up, after the notes had been protested, and that he did see Mr. Porter, and that Mr. Porter failed to make any arrangement. That the last of these notes came due in June, 1891, and that this sale took place in September, 1891.

(26) XI.

Because defendants' counsel having offered to prove by the witness, G. B. Boren, that during the discussion at a meeting of the Board of Directors of the John Porter Company, held at New Cumberland, West Virginia, May 9th, 1891, of the resolution offered at that meeting, after the resolution was read in the presence of Mr. Porter, as follows:

"Whereas there are two deeds of trust now existing as liens upon certain property of this company, purchased by it from John Porter, and for which he is desirous of indemnifying and securing this company against, the said John Porter tendered the company his note, at nine months from date, for ten thousand dollars ($10,000.00), with certificates for one hundred and fifty (150) shares in this company, with the power of attorney thereon endorsed, duly signed as collateral security for such note. The company to assume and pay said deed of trust. It was therefore resolved that said notes and certificates be and are hereby received and accepted, and that should said deeds of trust be paid off by said Porter, this company will surrender the note secured thereby to said Porter.

The said Porter is to sign hereafter a memorandum relative to such collateral certificates, and deliver the same to the treasurer aforesaid as soon as same is received from Alfred Caldwell, the attorney for this company." Mr. Porter asked: "Suppose that he paid this debt, these liens, off himself, what was to be done then?" That after that had passed the words were added to the resolution: "and that should said deeds of trust be paid off by said Porter, this company will surrender the notes secured thereby to said Porter," after counsel for defendants having stated that the purpose for which they made the offer was to explain what Mr. Boren had been talking about to Mr. Stewart, Mr. Stewart having testified that Mr. Boren told him in the middle of January that the company had assumed to pay off this indebtedness of John Porter on these liens, and had purchased Porter's stock; and counsel for defendants having further stated that they desired to show that the

company had assumed to pay off these Silvers and Stewart debts, and that Mr. Boren had admitted to Stewart that the company, and not Boren and Mack, had agreed to pay these liens, whereupon the plaintiff's counsel having objected to the defendants being allowed to prove this offer, it is here assigned as error that the court sustained the said objection.

XII.

That the court sustained the objection of the plaintiff to the offer of the defendants to prove by the witness, G. B. Boren, that before the foregoing resolution was offered Mr. John Porter represented that the Stewart and Silver liens did (27) not amount to over $9,000, and that that was the reason that the amount of the note mentioned in this resolution was fixed at $10,000, and that note was taken, and that the liens at that time amounted to $14,000.

XIII.

Counsel for the defendants having asked the witness, G. B. Boren, the following question:

"State whether or not the John Porter Company, before that meeting in January with Mr. Stewart, in 1892, had assumed to pay off these Stewart and Silver liens."

The question was objected to by plaintiff's counsel, and the objection was overruled by the court.

The witness answered: "They had."
Q. "State when and where."
A. "At the meeting of the directors, May 9th."
Q. "What year?"
A. "1891."

The COURT: "You cannot prove this. I will allow you to prove the simple fact that before that meeting of Mr. Boren, in January, with Mr. Stewart, in 1892, The John Porter Company had assumed to pay off these Stewart and Silver liens."

The defendants here assign as error the ruling and judgment of the court excluding the evidence showing when and where such agreement had been made by the John Porter Company.

XIV.

Upon the defendant excepting to the last mentioned ruling and judgment of the court, the court said: "Then I will exclude it all," and this last-mentioned ruling and (28) judgment of the court is here assigned as error.

XV.

The defendants having shown in evidence by John M. Mack, as a witness, that in December, 1891, he resided in Philadelphia, and that some considerable time before the consummation of the sale in the latter part of the year 1891, of 710 shares of stock of John Porter in The John Porter Company, defendants' counsel then asked the witness:

"If you saw Mr. Vance in relation to the stock in the John Porter Company, tell us what transpired?"

Which question was objected to by plaintiff's counsel, and it is here assigned as error that the court sustained said objection.

XVI.

Counsel for defendants thereupon offered to prove by John M. Mack, the witness on the stand, that along about the month of December, 1891, he had an interview with Mr. J. N. Vance, President of the Exchange Bank of Wheeling, in the City of Wheeling, in which Mr. Vance proposed to him to purchase the 710 shares of stock which were purchased afterwards, and that Mr. Mack informed Mr. Vance that he would not make any offer for that stock or have anything to do with the purchase of the stock if Mr. John Porter had anything to do with it; that he would only enter into negotiations in relation to the sale of it if it was the stock of the Exchange Bank, and he asked Mr. Vance if the stock was the stock of the bank and owned by it, and Mr. Vance replied that the bank did own it.

Whereupon counsel for plaintiff objected to the evi-
(29) dence offered by the defendants being permitted to be introduced.

The court sustained the objection, and the said ruling and judgment of the court is here assigned as error.

XVII.

Whereupon counsel for the defendants asked the witness, John M. Mack, as follows:

"State whether or not, before the sale of this stock by the Exchange Bank to you, the 710 shares, you had refused to have any dealings in relation to it with the bank unless they owned the stock, and had informed the president of the bank that you would have nothing to do with the stock if Mr. Porter had any interest in it, and that, prior to the interview of December 1st, 1891, and in the absence of Mr. Porter?"

Which question was objected to by counsel for plaintiff and the objection was sustained by the court, which ruling and judgment is assigned as error.

XVIII.

That the declaration as amended in this case sets forth as a part of the contract made by the defendants, for breaches of which this suit was brought, that the defendants, John M. Mack and G. B. Boren, "undertook and agreed to and with the said plaintiff that an indebtedness of the plaintiff to the said John Porter Company on an open account, the amount of which was not then definitely known, should be cancelled, and that the said defendants would pay off the same and that the plaintiff should never be sued therefor, but was then and there free from the same," (30) but no breach of the above quoted agreements or failure to perform the same is alleged in the declaration as amended, nor are damages claimed for any such breach.

In the suit of the John Porter Company, whose name was afterwards changed to the Mack Manufacturing Company, the court in Ohio, at Steubenville, gave judgment against John Porter for the amount of his indebtedness to the John Porter Company on open account, being a sum of four hundred dollars, and also gave judgment for the sum of fourteen thousand three hundred and seventy-two dollars and twenty-seven hundredths, the amount of the Silver's and Stewart liens, aggregating fourteen thousand seven hundred and seventy-two dollars and twenty-seven hundredths, with interest. A credit of fifty-seven hundred dollars, as of February 21st, 1893, was made on said judgment, amounting to $14,772.27, and interest, and the court at Steubenville, Ohio, gave judgment against John Porter for $9,190.63, with interest from February 21st, 1893, until payment. On the last mentioned judgment, suit being brought in Hancock county, West Virginia, by the Mack Manufacturing Company, judgment was rendered July 2d, 1894, for $9,941.21, with interest from the date of the judgment till payment, said $9,941.20 being the aggregate of the $9,190.63 and interest thereon to July 2d, 1894.

The defendants assign as error that the said Circuit Court of the United States rendered judgment against the defendants for the sum of $9,941 20
Interest from July 2d, 1894, to April 18th, 1895, 472 20
And costs, 30 20

$10,443 60

with interest from April 18th, 1895, until payment, and

(31) thus included in said judgment as aforesaid damages for breaches of agreements not alleged to have been broken in the declaration, and damages not demanded in said declaration, to-wit: the amount of said open account for $400 and interest thereon.

Respectfully submitted,

JOHN M. MACK and
G. B. BOREN,
By CALDWELL & CALDWELL,
Their Attorneys.

## PLAINTIFF'S DECLARATION AS AMENDED IN OPEN COURT DURING THE TRIAL.

(32) See Bill of Exceptions.

IN THE CIRCUIT COURT OF HANCOCK COUNTY.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

AMENDED DECLARATION.

John Porter complains of John M. Mack and G. B. Boren of a plea of trespass on the case in assumpsit, and says that heretofore and before the making of the agreement by the said defendants as hereinafter set forth, the said plaintiff had sold and conveyed to a corporation known by the name of the John Porter Company certain real estate in the said county, a portion of which was known as the Eagle Works, and another portion of which was known as the Ætna Works, and that at the time of such sale there was an indebtedness secured by a lien upon the said Eagle Works of about nine thousand dollars for which the said plaintiff was liable, which indebtedness was due to Mary A. Stuart and others, and on the said Ætna Works there was an indebtedness of about five thousand dollars similarly secured, and for which the said plaintiff was liable, which was due to one D. S. Silvers, and that after the said sale the said plaintiff remained liable upon both of the said indebtednesses, and that upon making the said sale to the said company the said plaintiff became and thereafter remained and continued liable to the said company to pay the said two indebtednesses last aforesaid, and thus to relieve the said company and the property which he had conveyed to it of liability with respect to the same. The said plaintiff says that the said indebtednesses to the

said Mary A. Stewart and others and the said D. S. Silvers were not due or payable at the time of his said sale to the (33) said company, nor at the time of the making of the said agreement by the said defendants, as hereinafter set forth, but became due and payable before they were paid by the said company as hereinafter stated. The said plaintiff further says that at and after the said sale he was the owner of fifteen thousand dollars of the stock at par of the said John Porter Company, and that he pledged the said fifteen thousand dollars of stock to the said company to secure it against loss by reason of the said indebtednesses. The said plaintiff further says that at and before the time of the making of the agreement by the said defendants, as hereinafter set forth, he was also the owner of seventy-one thousand dollars at its par value of other stock of the said company which had been pledged by him to secure an indebtedness to the Exchange Bank of Wheeling, and which was at the time of the making of the said agreement held by the said bank for that purpose. And the said plaintiff says that at the time of the making of the said agreement by the said defendants, as hereinafter set forth, the said defendant, John M. Mack, held a note of the said plaintiff on which there was a balance due of about four thousand dollars. And the said plaintiff says that the said stock so owned by him, as aforesaid, in the said company was, at the time of the making of the said agreement, of great value, to-wit, of the value of eighty-six thousand dollars. And the said plaintiff says that on a certain day, to-wit: on the first day of December, in the year 1892, at the said county, the said defendants in consideration of the agreement of the plaintiff then made that the seventy-one thousand dollars of stock held by the said Exchange Bank should be sold to the said John M. Mack for the sum of forty-one thousand dollars, which sale was then and there accordingly made, and in further consideration of the agreement (34) of the plaintiff then made that the said $15,000 held by the said John Porter Company should belong absolutely to the said company, and in further consideration that the plaintiff should sell to the defendant, Boren, and the said defendant, Boren, should purchase from the plaintiff $15,000.00 of stock of the said John Porter Company at the price of sixty-five cents on the dollar, the said defendants undertook and agreed to and with the said plaintiff that they would assume and they did thereby assume the said indebtedness for about nine thousand dollars due to the said Mary A. Stewart and others, and the said indebtedness of about five thousand dollars due to the said D. S. Silvers, and then

and there further agreed that they would pay off and discharge the said indebtedness due to the said Mary A. Stewart and others and the said indebtedness due to the said D. S. Silvers, when and as the said debts should, respectively, become due and payable, and that the said plaintiff should never be sued for either of the said indebtednesses last aforesaid, but that he was then and there free from the same and from all liability to the said Mary A. Stewart and others, or to the said D. S. Silvers, or to the said John Porter Company, by reason of the said indebtednesses last aforesaid, or either of them. And the said plaintiff says at the same time and place the said defendants also undertook and agreed to and with the said plaintiff that the said note of the said plaintiff held by the said John M. Mack, on which about four thousand dollars remained due, should be cancelled and returned to the said plaintiff. And the said defendants also undertook and agree to and with the said plaintiff that an indebtedness of the plaintiff to the said John Porter Company on an open account, the amount of which was not then definitely known, should be cancelled, and that the said defendants would pay off the same and that the plaintiff should never be sued therefor, but was then and there free from the (35) same. And the said plaintiff says that the said ndebtedness to the said Mary A. Stewart and others, and the said indebtedness to the said D. S. Silvers afterwards, to-wit: on the first day of January, in the year 1893, became due and payable, but that the said defendants, not regarding their said promise and undertaking, but contriving and intending to injure the said plaintiff and to subject him to loss and damage, did not perform their said agreement, and did not on the said first day of January, in the year 1893, when the said indebtednesses last aforesaid became due and payable, nor within a reasonable time thereafter, nor at any time, pay the said indebtedness due the said Mary A. Stewart and others as aforesaid, nor the said indebtedness due to the said D. S. Silver, but therein wholly failed and made default. And the said plaintiff says that afterwards, to-wit: on the second day of January, in the year 1893, the said John Porter Company (whose name has since the date last aforesaid and before the commencement of this suit been changed by proper proceedings to Mack Manufacturing Company) itself paid off and discharged the said indebtedness to the said Mary A. Stewart and others and the said indebtedness to D. S. Silvers. And afterwards, to-wit: on the day and year last aforesaid, instituted a suit at law in the Common Pleas Court in Jefferson county, in the State of Ohio, against the said plain-

tiff for the enforcement of the said plaintiff's liability to the said John Porter Company by reason of the said company's having paid off and discharged the said two indebtednesses last aforesaid, and for the recovery from the said plaintiff of the amount paid by it in paying off and discharging the same, and that in the said suit such proceedings were had that afterwards, to-wit: on the second day of February, in the year 1893, in the said Court of Common Pleas the said John Porter Company recovered a judg-
(36) ment against the said plaintiff for the sum of fourteen thousand seven hundred and seventy-two dollars and twenty-seven cents, with interest thereon from the thirty-first day of January, in the year 1893, and sixty-six dollars and seventy-four cents, the said sum of fourteen thousand seven hundred and seventy-two dollars and twenty-seven cents being the amount paid by the said company to discharge the said two indebtednesses last aforesaid with interest thereon from the time of such payment until the time of the judgment aforesaid. And the said plaintiff says that the bringing of the said suit by the said company and the recovery of the said judgment and the failure of the said defendants to pay the said two indebtednesses as aforesaid constituted a breach of the said agreement so made as aforesaid by the said defendants. And the said plaintiff says that the said defendants afterwards, to-wit: on the day and year last aforesaid, at the said county, had notice of all of the said premises. And the said plaintiff says that the said defendants thereby became liable to pay to the said plaintiff the said sum of fourteen thousand seven hundred and seventy-two dollars and twenty-seven cents, with interest from the said thirty-first day of January, in the year 1893, and the said sixty-six dollars and seventy-four cents costs. And being so liable the said defendants afterwards, to-wit: on the said 2d day of February, in the year 1893, at the said county, undertook and promised the said plaintiff to pay him the said sum of fourteen thousand seven hundred and seventy-two dollars and twenty-seven cents and the said interest, and the said sixty-six dollars and seventy-four cents costs, when they, the said defendants, should be thereunto afterwards requested. Yet the said defendants, although often requested so to do, have not as yet paid to the said plaintiff the said sum of fourteen thousand seven hundred and seventy-two dollars and twenty-seven cents, or the said interest, or the said sum of sixty-six dollars and seventy-four cents, or any part of either, but to pay the same have hitherto wholly neglected and refused, and still do neglect and refuse. And for an assignment of special damage by reason of the premises the said plain-

tiff says that afterwards, to-wit: on the day of April, in (37) the year 1894, the Mack Manufacturing Company brought an action at law in the said Circuit Court of Hancock county to recover of and from the said plaintiff a judgment for the amount of the said judgment so rendered as aforesaid by the said Court of Common Pleas, and that afterwards, to-wit: at the term of the said Circuit court of Hancock county the said Mack Manufacturing Company recovered a judgment in the said action against the said plaintiff and caused execution to issue thereon and to be levied upon certain property of the said plaintiff in the said county of Hancock to the damage of the said plaintiff, $20,000. And, therefore, the said plaintiff brings his suit, &c.

DONEHOO, HUBBARD, RUSSELL.

## BILL OF PARTICULARS.

JOHN M. MACK AND G. B. BOREN,
DEBTORS,
To JOHN PORTER.

| | | | |
|---|---|---|---|
| 1893, Feb. 2. | To amount of judgment in Common Pleas Court of Jefferson county, rendered against the plaintiff in favor of the Mack Manufacturing Company, | $14,772 | 27 |
| " " " | Interest from Jan. 31, 1893, to Feb. 2, 1893, | 4 | 84 |
| " " " | Costs, | 66 | 74 |
| | | $14,843 | 85 |

Interest will be claimed until payment.

## ORDER RELATING TO BILL OF EXCEPTIONS.

(38) July 5th, 1895.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

The defendants on the 17th day of May, A. D. 1895, tendered their bill of exceptions, and prayed that the same might be signed and sealed by the court and made a part of the record in this action, which is here accordingly done this 5th day of July, A. D. 1895.

## (39) BILL OF EXCEPTIONS NAMED IN LAST ORDER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Debt.

BILL OF EXCEPTIONS.

Be it remembered that afterwards, to-wit: On the 15th day of April, A. D. 1895, at a regular term of said court, begun and holden in the city of Wheeling before his honor, John J. Jackson, Jr., District Judge, the issues joined in the above stated cause between the said parties (*pro ut* the pleadings) came on to be tried before the said judge and a jury, the plaintiff being represented by Henry M. Russell, Esq., and William P. Hubbard, Esq., of counsel; and the defendants by Caldwell & Caldwell, their counsel.

Whereupon the attorney for the plaintiff, John Porter, to maintain and prove the said issues on his part, called as a witness James M. Porter, who, being duly sworn, testified as as follows:

I am a cousin of plaintiff. The Exchange Bank of Wheeling, West Virginia, held $71,000 of stock in the John Porter Company, so held in the name of John J. Jones, trustee, as collateral security for a debt of the plaintiff to the bank. That the said John Porter and John J. Jones, trustee, gave, on the 29th day of November, 1891, to the witness, James M. Porter, a power of attorney to sell that stock. Witness, on December 1st, 1891, met John Porter, G. B. Boren, De Haven Lance and J. N. Vance, at Steubenville, Ohio, by appointment at the Imperial Hotel. Witness was to try to sell the stock, but had made no ef-
(40) fort to sell it. On November 30th, 1891, he was going to Pittsburgh, Pennsylvania, from New Cumberland, West Virginia, and received a message from Mr. J. N. Vance, President of the Exchange Bank, that he would meet him on the train. The plaintiff, the witness and Mr. Vance went up together on the train on November 30th, 1891, to Pittsburgh, and Mr. Vance told witness that Mr. De Haven Lance had been down to the bank in Wheeling and had made an offer for the stock. He was the representative of Mr. Mack. He wanted to talk over what we would do in the matter. We telegraphed from Pittsburgh to know whether they would meet us at the Imperial Hotel, in Steubenville, Ohio. We met them there by appointment, as they telegraphed, "Yes."

Witness first met Mr. G. B. Boren, the defendant. Mr. Boren, Mr. Lance and witness went up stairs in the hotel. We were up there quite a while talking over the matters, and Mr. Boren had learned I was trying to sell this stock. Mr. Boren had loaned Mr. John Porter some money and had some of this stock as security. Mr. Boren made an offer for that stock at 65 cents on a dollar. There was $15,000 of it. Mr. Lance said he had nothing to do with that stock. There was also $15,000 of stock of John Porter held as security for the two deeds of trust given by John Porter to secure the G. W. Stewart estate and Silvers.

Mr. Boren offered 65 cents on the dollar for the $15,000 of stock held as collateral by him, but we refused to sell unless I sold all. That is, what I mean by "all" was the Exchange Bank $71,000, and some arrangement made for the $15,000 that the company held.

The two deeds of trust were the G. W. Stewart $9,000, and the other $5,000 given by John Porter on the Ætna (41) and Eagle Works, of which the John Porter Company had become the owner at the time of that meeting in Steubenville.

When we stated that we would not sell that $15,000 of stock to Boren unless we sold all the stock, Mr. Lance said he wasn't prepared to deal for anything except what was in the Exchange Bank, and he made an offer of $41,000 for that. We couldn't agree, and finally came down stairs. Nobody was present up stairs with Mr. Boren, Mr. Lance and myself. We talked over it quite a while down stairs, where we met Mr. Vance and Mr. John Porter, but I don't remember what was said there. And after we left, on the road—either right in front of the hotel or between there and the depot, this $4,200 or $4,000 of Mr. Mack came up, in Philadelphia, We talked about whether that could be canceled and an arrangement could be made for that. I don't know whether it was John Porter or myself brought that up. I don't remember who brought that up. Mr. Lance said there would be no trouble about that of Mr. Mack's in Philadelphia, that he would guarantee that he would return the notes canceled, that he knew Mr. Mack would never sue on the notes and never intended to sue him on them, and that the matter was all settled but the Exchange Bank and the stock of Mr. Boren. And we finally agreed that if Mr. Mack would surrender those notes, whatever they were, and the John Porter Company would pay off these deeds of trust of $14,000 ($9,000 and $5,000) that Mr. Boren could have his stock at 65 cents on the dollar, and they could take what was in the Exchange Bank at

$41,000, provided this other arrangement was made. Mr. Boren and Mr. Lance both said, as representatives of the John Porter Company, they could not make any agreement of that kind, they wasn't there to represent the company and couldn't do anything of that kind.

(42) The proposition was made by them like this, that if we would let them have that stock in the Exchange Bank, $71,000 for $41,000, and let Mr. Boren have his stock at 65 cents on the dollar that they would return these notes in Philadelphia amounting to several thousand dollars, I don't just remember the amount; that they would agree personally that they would see that John Porter was never sued on these deeds of trust of $9,000 and $5,000. They agreed to stand between him and the company, and to indemnify him. They guaranteed him he would never be sued on them, and that is the way the matter was settled. That agreement was made on the streets between the Imperial Hotel in Steubenville and the depot, by Mr. Boren, Mr. Lance, Mr. John Porter and myself; we were all present.

Cross-Examination.

I first met Mr. Lance on December 1st, 1891, at Cumberland Junction. I didn't know what Mr. Vance wanted with me when he telegraphed me on November 30th. I wasn't doing business at Pittsburgh at that time, but was going there with reference to the sale of that stock. He knew that I was going to Pittsburgh in the morning. I had told him that I had no offer for the stock, and did nothing there with reference to the sale of the stock, only talked about it among ourselves. We talked about this stock that day at the Monongahela House.

What made us telegraph or telephone to Mr. Lance was because Mr. Vance told us that he had an offer of $41,000 from Mr. Mack for the stock. We were about an hour and a half at Steubenville, and Mr. Porter and I went home together on the train going up the Ohio River. Mr. Boren, Mr. Lance and I talked up stairs but a few minutes.

(43) I seen there was no use talking, they wasn't going to come to any agreement. The reason we asked Mr. Boren to come to Steubenville was because he held $15,000 stock against John Porter for an individual debt of John Porter to Boren, and we wanted to close the whole thing up. The cross-examining counsel then asked the witness the following questions: "Mr. Porter, in the case brought in Hancock county, did you make an affidavit—brought by John Porter against the Mack Manufacturing Company, and a number of others—didn't you make an affidavit for the plaintiff in

the endeavor to obtain an injunction. The defendants were the Mack Manufacturing Company. Didn't you make this affidavit? (Showing witneess a paper.)" And the witness answered: "Yes, sir."

Which paper read and was in the words and figures following, to-wit:

STATE OF WEST VIRGINIA, Hancock County, } To-wit:

Before me, Daniel Donehoo, a notary public within and for said county of Hancock, this day, June 18th, 1894, personally appeared James M. Porter, who, being by me first duly sworn, on his oath, says: I am acquainted with the Mack Manufacturing Company, plaintiff in an action now pending in the Circuit Court of said county of Hancock, on the law side thereof, against John Porter, and with the said John Porter.

I know that "The John Porter Company," a joint stock incorporation (the said John Porter being one of the original incorporators thereof, and previous to the month of December, 1892, was a stockholder therein), did business in this county as a manufacturer of fire bricks, tile and like products for a number of years under that name (44) until in the month of January, 1894, as I am imformed and believe, through due and proper proceedings to that end, the name of said company was changed to that of "Mack Manufacturing Company;" that in about the month of December, 1892, a meeting, at which, by previous arrangement and appointment, there were present John M. Mack, who appeared not in person but by De Haven Lance, who was also Secretary of the said "The John Porter Company;" G. B. Boren, General Manager of the said "The John Porter Company;" J. N. Vance, President of the Exchange Bank of Wheeling, W. Va., in behalf of said bank, the holder of $71,000.00 par value of the stock of said "The John Porter Company" as collateral, and myself; that said meeting was held in the city of Steubenville, State of Ohio; that at said meeting certain matters pertaining to the affairs of said "The John Porter Company" were discussed, and among them the matter of two certain trust deed lien indebtednesses, which, it appeared, existed against the "Eagle Fire Brick Works" and the "Aetna Fire Brick Works," two properties previously owned by said John Porter, said encumbrances having been placed thereon by the said John Porter during his ownership of the same; that at said meeting in Steubenville said De Haven Lance, agent for said John M. Mack,

made the following agreement to purchase $71,000.00 par value of the stock of The John Porter Company owned by John Porter, in the hands of the Exchange Bank of Wheeling, far the sum of $41,000.00, and the further consideration of a balance of a note in the hands of John M. Mack of about $4,000.00, which was to be cancelled and returned to the said John Porter, this was there agreed to; also said Lance, as agent for said Mack, and G. B. Boren, in consideration of the low price that the $71,000.00 of (45) stock was sold for, agreed with the said John Porter to assume a deed of trust lien on the Aetna Works for about $5,000.00 and one on the Eagle Works for about $9,000.00, or about $14,000.00 in all, for which $15,000.00 of stock of said company, belonging to said John Porter, was held as security; they said they could not agree to this for said company, but would guaranty that said John Porter would never be sued for the amount, and he was free from debt to the said "The John Porter Company," on account of said lien indebtedness. The $15,000.00 of stock held by said company as security for the $5,000.00 and $9,000.00 trust deed liens was to become the property of the said "The John Porter Company."

(Signed)

JAMES M. PORTER.

Taken, sworn to and subscribed to before me, in my county aforesaid, this 18th day of June, 1894.

(Signed)

DAN'L DONEHOO,
Notary Public.

The witness further testified: I cannot tell why I didn't mention anything about this matter of Mr. Boren giving sixty-five cents for the $15,000 of stock held by him individually as collateral, being a part of the agreement made up there at Steubenville, Ohio. I just answered the questions on that affidavit that they asked me. I was just answering the questions the same as I am here—oh, I don't know why. I was going to say that that was a different suit altogether. John Porter insisted that the $15,000 of the company, $15,000 that Boren held and the $71,000 was all to be in the same contract. There was one mistake in the affidavit. The year 1891 was put in for 1892. I don't remember anything about where and when I swore to that affidavit, but I recognize my signature to it. I remember reading it over, and I know I read it over because I would not sign it without reading. I made a

(46) statement in writing on a sheet of paper at the office and gave it to John Porter, and that was prepared from that, and it was brought to me and I signed it. I have never seen that statement since, and do not know where it is.

I am a business competitor of this company, the Mack Manufacturing Company.

When we were going down there to the train, after we left the hotel, it couldn't have been longer than a few minutes between the time we left the hotel and the time we went on the train. We hadn't very much time there, there was just a rush all the way through.

I don't know whether Mr. Vance was there when I testified that Mr. Lance agreed to what John Porter and I proposed. I dont't know whether Mr. Vance was there at that time at all or not.

The witness was then asked by the court:

"Where did this talk take place?" You said you didn't know whether Mr. Vance was there.

The witness answered:

"Mr. Vance wasn't in the room with us at all. It is my impression Mr. Vance was there—that is, on the street—but I wouldn't say sure.

Being further interrogated by the cross-examining counsel, the witness proceed:

I don't know whether Mr. Vance or Mr. Boren agreed to this or not, but we all went down to the train together, and we would stop every once in a while. Mr. Vance didn't have much to say about the transaction at all. He just left it to John Porter and I. Mr. Vance was with us when we got down to the train. We stopped right at the (47) station, where we had our last talk. He left the hotel with us, but I am not certain whether he heard the conversation we had on the street or not. He was with us all the time, right close together. The train going up the river left first, and Mr. John Porter and I went on that train. Mr. Vance was there to go down. Nothing at all said that night about putting this agreement in writing.

I don't recollect of Mr. John Porter just before he got on the train turning around to Mr. Lance and saying, "Recollect that is to be 60 cents," and Mr. Lance saying to him $41,000, or words to that effect. Mr. Lance's understanding was that he was to get this stock for $41,000, and he was informed of all this down at the depot. Mr.

Boren bought a lot of the stock that night for 65 cents. Mr. Lance never talked anything except the $41,000. He said that was all he had authority to give and that was all he would give, and then that matter came up about the Philadelphia matter, and he said that every place, first and last and all the time. $41.000 was all he would talk of—this $41,000. He said this a number of times, and that he wasn't authorized to give anything more than $41,000. He and Mr. Boren said they were not authorized to represent the company; that neither one of them was authorized to represent the company. Mr. Lance didn't tell me upstairs that he wasn't authorized to indemnify too. We didn't get that far along upstairs. I just seen I couldn't do anything, and Mr. Lance said he would give $41,000 for that stock, and I knew there was no use talking any further unless we sold the whole thing, and he wouldn't take anything but $71,000 stock for $41,000. The plaintiff here offered and put in evidence the affidavit above inserted herein of the witness, James M. Porter.

(48) The witness then was asked by the cross-examining counsel the question: "In the first you claimed $12,000, and in that you had how much book accounts that John Porter owed you individually?"

The witness answered:

"I couldn't say. I included in that account the unpaid notes which were in the Steubenville Banks, which I suppose were his personal notes, John Porter's."

Whereupon the said plaintiff, further to prove and *and* maintain the said issue on its part, called as a witness GEORGE W. STEWART, who being duly sworn, testified as follows:

I reside in Pittsburgh, Pennsylvania, and am a wholesale boot and shoe dealer. About the middle of January, 1892, in the court-house at New Cumberland, Hancock county, West Virginia, I met John Porter and G. B. Boren, by agreement, to see if we couldn't agree in regard to a settlement of our deed of trust, and, I might mention, prior to that time we had advertised the property for sale and the John Porter Company enjoined us, prevented us proceeding. We had quite a heated discussion. In the course of remarks I said to Mr. Boren: "It seems unjust that you would try to avoid the payment of our deed of trust after having purchased from John Porter, with the understanding that you were to pay this deed of trust," and Mr. Boren remarked, "We did, but we are not going to pay a cent more than we can help."

CROSS-EXAMINATION.

The John Porter Company were trying to arrive at the amount due under that deed of trust. That was the reason of the disagreement or the discussion we had that (49) day. I rendered one or two statements to them.

The witness then continued on cross-examination: After I had advertised the property for sale we found a $3,000 note given for the store account, and I dropped that out. Yes, sir, I judge Mr. Boren represented The John Porter Company, and there was some pretty brisk talk going on there. I am positive of only referring to our own deed of trust. I told him I thought it was unjust in them trying to avoid the payment of our deed of trust after having purchased this John Porter stock from John Porter with the understanding that they were to lift this deed of trust. He said: "I know we did; but we are not going to pay a cent more than we can help." I can't recall any conversation to the effect that what Mr. Boren was talking about was their having to lift this deed of trust in order to negotiate their bonds.

Thereupon the plaintiff, to further maintain and prove the said issue on its part, recalled the witness, JAMES M. PORTER, who then testified as follows:

After the time of this transaction in Steubenville, I had a talk about it with G. B. Boren at a time when Oliver S. Marshall was present. I don't remember when it was, but it was at what is known as the old West Virginia Fire Brick Company's Office. I think at that time it was the John Porter Company's office, and I then made the same statement as I have given above in my testimony. Mr. Boren said it was correct.

(50) Whereupon the jury, trial and court were duly adjourned until the next day, being Tuesday, April 16th, 1895, when the plaintiff, to further maintain and prove the said issue on its part, called as a witness O. S. MARSHALL, who being duly sworn, testified as follows:

I reside in New Cumberland, Hancock county, West Virginia. I am clerk of County Court, and I was present at a conversation between Mr. Boren and James M. Porter, in which was mentioned a transaction that had taken place at Steubenville, which I have heard mentioned by the witnesses here. I can't recall any of the conversation; I don't remember what Mr. Porter said to Mr. Boren, and I can't recall what Mr. Boren said to Mr. Porter. I was

there for a different purpose and had no interest in the conversation. I felt a little disappointed at my business failing, and don't recall any of the conversation. This was at the office of the West Virginia Fire Brick Company. On the 11th of January, 1892, I was to meet Mr. Boren and Mr. Mack and the Porter people at the West Virginia Fire Brick office to settle a transaction between Mrs. Porter and Mr. Mack, in which I was attending to the business for Mrs. Porter, and also for Isaac Evans, a very aged citizen of the county, who had a large claim against both parties. I was trying to have that adjusted, and was to meet there by appointment. I met at Mr. Mack's office at Rocky Side with Mr. Porter in the morning, and the same evening was to meet at the West Virginia office. When I went there Mr. Mack was not there. Mr. James M. Porter was there and Mr. Boren was there. I don't remember any conversation between them, but I remember asking Mr. Boren why Mr. Mack was not present. He replied that Mr. Porter and Mr. Mack would fight, and he didn't want (51) to come. My mission then had failed—my business that I was to attend to—and I can't recall anything, but the next day I met Mr. Mack and wanted to know why. I can't recall exactly the conversation, but just remember I said to Mr. Mack that Boren hadn't denied what was said by Porter. I don't remember what the reply was. My recollection is that it was true that the night before Boren hadn't denied what Porter said to him.

CROSS-EXAMINATION.

I met Mr. Mack at the depot of the New Cumberland branch of the P. C. & St. L. R. R. My recollection is that what Mr. Mack said, when I told him that Mr. Boren hadn't denied what Porter said, was that we would all get together and have the matter fixed up—that was my matter and his, the Evans matter. I can't recall any of the conversation of the day before. Mr. Boren and James M. Porter were talking over their differences, and I referred to that conversation as above. I don't know that Mr. Boren said anything. My impression is that he did not say anything, but I am not sure. I just remember what I said the next day, and get my impressions from that day, that he didn't deny; didn't say anything. Mr. Boren and Mr. Mack and I were together. I mean that Mr. Boren didn't say anything the night before.

And, thereupon, the plaintiff, to further prove and maintain the said issue on his part, called as a witness J. N. VANCE, who being duly sworn, testified as follows:

I am President of the Exchange Bank of Wheeling, and was such President in December, 1891. At that time the bank held 710 shares of the stock of this Brick Company as collateral for loans made to Mr John Porter, and (52) that stock was transferred afterwards. Some little time after we took it, it was transferred to Mr. John J. Jones, as trustee for the bank, and we held it in that condition at the time it was sold to Mr. Mack, which occurred in the early part of December, 1891. That sale came about in this way. There was some talk with Mr. Mack about the purchase of this stock, and then Mr. Lance, his representative, came to see us about it, and about that time a power of attorney was given to Mr. James M. Porter, and soon after that, within a day or two, another application was made to purchase the stock by Mr. Lance, representing Mr. Mack. Then I went to Pittsburgh and met Mr. Porter. We knew he was to be in Pittsburgh. After a conference with him we agreed to telegraph Mr. Boren and Mr. Lance to meet us at Steubenville. They agreed to do so, and we went down and met them in Steubenville and had a conference there together, talking the matter over generally, and finally came to a conclusion, and the next morning the stock was transferred or a settlement was made in Wheeling by Mr. Lance, our attorney and myself. We came to a conclusion in Steubenville. The matter was talked over some at the hotel. I had very little time to see about the matter. The talked there within a short time of the departure of the train. I was coming down and Mr. James Porter and John were going up to New Cumberland. We started and walked down to the station. Just what the matter of difference or what the request of Mr. Porter was I never fully understood.

My recollection is that at the station we coulnn't talk over much. The trains were about to leave, and Mr Lance and Mr. Boren, as I remember, just gave assent to the matter in a very informal and indefinite manner, to whatever they had been talking about. I don't know whether it embraced all the talk or only a portion of. That matter was (53) never fully understood by me, what that difference was—what that matter of talk there was. My understanding was that Lance and Boren assented to what the other side proposed. I don't know what the terms were. I know that after they left an arrangement was made with Mr. Lance, or a request made to come to Wheeling, and he came down the next morning, and the matter was settled up between the bank and Mr. Mack, by Mr. Lance, Mr. Mack's agent.

CROSS-EXAMINATION.

I really didn't understand what they consented to, whether it was all or part. It was really a nod or something of that nature. I couldn't tell whether it was all or part. I wasn't present at all of the conference. I heard a little of the talk in the office of the hotel after they came down stairs, and had a little talk on the way down to the train. I can't recall what it was I heard. I came down from Pittsburgh with Mr. John Porter that same day on the train. On the train he was speaking about the sale of some stock that had been made by Mr. Mack in Philadelphia, stock that he had transferred over to Mr. Mack as collateral security for some indebtedness, and that Mr. Mack had sold it, bought it in himself at a very low price, and by that means had done him a great injustice. He said that Mack ought to make that up to him, the difference between the price he had purchased the stock at and the price it was really worth, and that was the grievance he told me of. I can't recollect of hearing him say anything in relation to mortgages on the property of the company.

I think I remember something of this kind, that Mr. Lance came and told me that he would withdraw the offer of $41,000 for $71,000 of stock, if that stock was hawked (54) about by James Porter. Probably that was what caused me to go to Pittsburgh.

I think it was 65 Mr. John Porter had fixed for the sale of that stock. He consented to make it 60 after we reached Steubenville, but he never did consent at the hotel. It was only on certain conditions that he was willing to do that. These conditions intervened between these gentlemen at the hotel. 60 was the lowest he would agree to sell at Steubenville, and that was on condition that certain things were to be done. I can't recall what they were, because I wasn't consulted. What I heard was more in the shape of a listener, an outsider. I was left down in the office, and I think Mr. Lance came down and joined me there. As to how we came to close the thing up the next day, it was with the understanding that Mr. Porter was willing to accept $60 a share for the stock. We got about 57 and a fraction. We got $41,000 for 710 shares. The understanding of Mr. Porter was to accept $60. The bank gave Mr. Porter credit between what was got for the stock and the price he agreed to sell, which amounted to $1,600. We were very anxious to sell the stock. We did not take any legal form of means to sell this collateral. We wanted to pocket the loss and get the thing adjusted. We wanted Mr. Porter satisfied with the sale, as we were proceeding

illegally unless we had his consent. We would not have been entitled to sell the stock in that way, and we desired to have his consent to the sale, which he was willing to do at $60 a share. As to what he said before we left, and how we knew we were authorized to close at this $60 a share, the authority we had for closing was just the assent, and the condition things were in when we parted at the station the evening before. As to what was said, they just seemed to be willing to concede something. I don't know (55) what it was. I don't think anything was said by me to Mr. Porter after that. I closed it without anything further. My recollection is his train left first, and we had a few minutes longer to remain than Mr. Porter. He was going up and mine was coming down. I think I did request Mr. Lance to come to Wheeling the next morning. When we got down here the next morning the sale was consummated on the terms that we agreed upon up there, or rather that were assented to. The offer that was made by Mr. Lance for Mr. Mack was accepted—$41,000 for 710 shares—and the settlement was made at the bank the next day on that basis. I am not clear that Mr. Lance and Mr. Boren both told me that they wouldn't deal with Mr. Porter, but would deal alone with the bank. I have that impression though.

The following paper was put in evidence by the defendants, to-wit:

"Agreement made this second day of December, 1891, between the Exchange Bank of Wheeling, of the city of Wheeling, W. Va., of the first part, and John M. Mack, of the city of Philadelphia, Pennsylvania, of the second part.

Witnesseth:

Said bank agrees to sell to said Mack, who agrees to buy, 710 shares of the capital stock of the "John Porter Company" (incorporated), of New Cumberland, West Virginia, now standing in the name of John J. Jones, trustee, for the sum of $41,000 to be paid as follows: $5,000 in cash, $5,000 in 30 days, $10,333 in six months, $10,333 in 12 months, and $10,334 in 18 months from this date, for the deferred payments, notes or accepted drafts to be given with interest. Upon the payment of the said $5,000 in cash, said bank will transfer and deliver to said (56) Mack 50 shares of said stock; upon the payment of said $5,000 and interest in 30 days and the said $10,333 in six months and interest, said bank will transfer and deliver to said Mack 220 shares; upon the payment of $10,333 and interest in twelve months, said bank will

transfer and deliver to said Mack 220 shares; and upon the payment of $10,334 and interest in 18 months said bank will transfer to said Mack 220 shares, the residue of said 710 shares herein before sold.

It is agreed that in the event that said Mack desires an extension of the payment of said $10,334 due in 18 months, said bank will extend the payment thereof for 6 months longer, said Mack paying interest thereon and said bank retaining as collateral thereto said residue of stock.

Said bank hereby agrees to immediately have said 710 shares transferred to it upon the books of the John Porter Company by a transfer made and signed by John J. Jones, trustee, in whose name they now stand.

Should said Mack desire to substitute before its maturity for said note for $10,333 and interest at 6 months, a note falling due at the same date, with security thereon satisfactory to said bank, the bank will accept said substitute note and surrender the said $10,333 note at 6 months first mentioned, and transfer to the said Mack 220 of said shares, provided the $5,000 and interest at 30 days aforesaid have been paid.

Said Mack shall at any stockholder's meeting of said company have the right to control the vote of the said stock so transferred to said bank, and a proper proxy from time to time will, at his request, be executed to carry out the said intention.

Said Mack shall have the right to anticipate the time
(57) of the payment of any of said deferred installments, interest to cease on the said installments when so paid, and the stock then to be transferred as hereinbefore provided.

Witness the following signatures:

THE EXCHANGE BANK OF WHEELING
By J. N. VANCE,
President.

JOHN M. MACK,
By DE HAVEN LANCE.

John J. Jones, trustee, in whose name said 710 shares of stock stand, in consideration of the foregoing agreement, agrees to carry out the same, he here declaring that he holds said stock for the use and benefit of the said "The Exchange Bank of Wheeling," this second day of December, 1891.

JOHN J. JONES,
Trustee.

The witness, J. N. VANCE, further testified:

I signed that document and Mr. John J. Jones, who was then cashier of the Exchange Bank, signed that declation as to whom he held that stock in trust for. My recollection is that the attorney of the bank drew up this agreement and it was executed in the bank.

Counsel for the defendants then propounded to witness the following questions:

The original agreement is: "This agreement made this second day of December, 1891, between the Exchange Bank of Wheeling and John M. Mack, of Philadelphia, &c.," who acted there with Mr. Lance; had he any lawyer?

Which question was objected to by plaintiff's counsel.

The COURT: You must try the case on these pleadings.

Counsel for the defendants then offered to prove by this witness that the original notes offered in this con-
(58) nection, from which the contract between the Exchange Bank of Wheeling and John M. Mack of the 2d day of December, 1891, (which has been put in evidence) was prepared, were originally prepared on the sheets marked 1 and 2 by Mr. A. J. Clarke, attorney for the Exchange Bank of Wheeling. Which notes, as originally prepared were as follows:

"Agreement made this 2d day of Dec., 1891, between The Exchange Bank of Wheeling, of the city of Wheeling, W. Va., of the 1st part, and John M. Mack, of the city of Phila., Penna., of the 2d part—witnesseth:

Said bank agrees to sell to said Mack, who agrees to buy, 710 shares of the capital stock of "The John Porter Company," (incorporated) of New Cumberland, W. Va., now standing in the name of John J. Jones, trustee, for the sum of $41,000.00, to be paid as follows: $5,000.00 in cash; $5,000 in 30 days; $10,333 in 6 months; $10,333 in 12 months, and $10,334 in 18 months from this date—for the deferred payments notes or accepted drafts to be given with interest.

Upon the payment of the said $5,000 in cash, sd bank will transfer and deliver to said Mack 50 shares of said stock. Upon the payment of the said $5,000 and int. in 30 days and of the said $10,333 in 6 months and int., said bank will transfer and deliver to said Mack 220 shares; upon the payment of $10,333 and int. in 12 months, said

bank will transfer and deliver to said Mack 220 shares, and upon the payment of $10,334 and int. in 18 months, said bank will transfer to sd. Mack 220 shares, the residue of said 710 shares hereinbefore sold.

It is agreed that in the event that said Mack desires an extension of the payment of said $10,334 due in 18 months, said bank will extend the payment thereof for 6 months longer, said Mack paying interest therefor, and said bank retaining as collateral thereto said residue of (59) stock.

Said Mack shall at any stockholders meeting of sd. Co. have the right to control the vote of the said stock so transferred to said bank (standing in the name of the said John J. Jones, trustee,) and a proper proxy, from time to time, will, at his request, be executed to carry out the said intention

Said Mack shall have the right to anticipate the time of the payment of any of said deferred installments, interest to cease on the said installments when so paid and stock to be then transferred as hereinbefore provided.

Witness the following signatures:

John J. Jones, trustee, in whose name said 710 shares of stock stand, in consideration of the foregoing agreement, agrees to carry out the same, he here declaring that he holds said stock for the use and benefit of the said "The Exchange Bank of Wheeling," this 2d day of Dec., 1891."

That said notes were submitted, through Mr. DeHaven Lance, on the day they were prepared, the 2d of December, 1891, to Alfred Caldwell, as attorney for Mr. John M. Mack, and the additions were made in pencil by Mr. Caldwell, in his own handwriting, to the said notes as shown on page 3, which page 3 is as follows:

"Said bank hereby agrees to immediately have said 710 shares transferred to it upon the books of The John Porter Company by a transfer made and signed by John J. (60) Jones, trustee, in whose name they now stand.

Should said Mack desire to substitute before its maturity for said note for $10,333 and int. at six months, a note falling due at the same date, with security thereon, satisfactory to said bank, the said bank will accept said substitute note and surrender the said $10,333 note at six months first mentioned, and transfer to the said Mack 220 of said shares, provided the $5,000 and int. at 30 days aforesaid have been paid."

That said agreement was written on the typewriter in Mr. Caldwell's office from the notes prepared by Mr. Clarke, as amended by Mr. Caldwell; and after having been transcribed upon the typewriter were signed by Mr. J. N. Vance for the Exchange Bank of Wheeling, and by Mr. Lance for Mr. Mack, as is shown on the agreement put in evidence.

The COURT. That is not objected to, and that is not what I am ruling on either. I stated to you that I would not permit you to go into this collateral investigation in this transaction, so far as it does not tend to throw any light on this subject. I don't think it has anything to do with it.

EXCEPTION 1.

Plaintiff, by counsel, then and there objected to the defendants being allowed to introduce testimony as offered. Which objection was sustained by the court, and to the said ruling and judgment of the court defendants then and there excepted. (The first exception.)

The witness, J. N. VANCE, continued:

I think the first introduction of the matter of the sale of this stock to Mr. John M. Mack was that I broached the matter to him. I proposed to Mr. Mack to buy this stock. (61) My recollection is that Mr. Mack came to the bank on some business matters, and I had an interview with him there, and proposed to him to buy this stock. It had been transferred from Mr. Porter to Mr. Jones as trustee for the bank, and was held as collateral security for loans made to Mr. Porter. I don't recollect what I represented to Mr. Mack about the ownership of the stock. We always felt as if we had the stock in our hands to sell when we desired. I don't recollect that Mr. Mack said that he wouldn't deal with anybody except the bank. It was the understanding that the bank owned the stock at the time, in the name of Mr. John J. Jones as trustee for the bank. It had been transferred. I am not clear about whether I represented to Mr. Mack that the bank owned the stock. I may have done so.

There was $5,000 paid cash on this stock. The receipt for which reads as follows:

"J. N. Vance, President. John J. Jones, Cashier. L. S. Delaplain, Vice-Pres't.

EXCHANGE BANK,

WHEELING, W. VA., Dec. 3, 1891.

Received of DeHaven Lance, draft on John M. Mack,

Philadelphia, Pa., for five thousand dollars, dated Dec. 3d, 1891. Payable to the order of John J. Jones, Cashier, being for the first payment for John Porter stock bought of the Exchange Bank.
$5,000.

J. N. VANCE,
Prest."

I think Mr. Lance wrote that except the signature and the interlineation which appears therein of the words "being for the first payment for John Porter stock bought of the Exchange Bank," which are in my handwriting. I (62) am not sure Mr. Lance wrote the rest of the said receipt. Probably one of the clerks in the bank wrote it. This stock has all been paid for.

RE-DIRECT-EXAMINATION.

I suppose I made the interlineation at the suggestion of Mr. Caldwell. He had been there. If Mr. Caldwell had anything to do with that receipt, he had to do with it in the form it was without that interlineation. The interlineation was made at the time it was signed. Who brought it to me I can't remember.

RE-CROSS-EXAMINATION.

I don't remember who brought me that receipt. It is on the letter head of the bank, written in the bank and signed in the bank. and what caused this interlineation I can't remember, but was evidently put in by me as President of the bank. What occasioned that interlineation I can't recall.

Thereupon the plaintiff's counsel, to further maintain and prove the said issue on his part, called him, the said John Porter, as a witness on his own behalf, who being duly sworn, testified as follows:

I reside in Hancock county, West Virginia, opposite Wellsville, Ohio, and am in the fire brick business. I have lived there for two years, and before that lived nine miles further down the river at New Cumberland, West Virginia, where I was in the fire brick business. I was stockholder in the John Porter Company, and in 1891 had over a thousand shares in that company. I organized the company. (63) I had some of my stock held as collateral. $71,000 of it was pledged with the Exchange Bank for money I borrowed—notes I had given. It had been transferred to Mr. Jones as trustee. It had stood in my own name on

the books of the company until it was transferred to Mr. Jones as trustee about November, 1891. The Exchange Bank held a certificate for the stock as collateral for this debt. James M. Porter was given a power of attorney to sell this stock by the Bank and myself, about the latter part of November, a few days before the transaction at Steubenville about which the witnesses have been speaking.

Mr. Vance, James M. Porter and myself went to Pittsburgh, I think on the morning of November 30th, to talk over the sale of this stock. I think Mr. Vance and Mr. James Porter likely had some other business. We met and went on the train altogether to Pittsburgh, and we telephoned to Mr. Lance and Mr. Boren and asked them to meet us at Steubenville that evening. That was about the first of December. We met Mr. Lance and Mr. Boren at Steubenville. Mr. James M. Porter and Mr. Vance were with me. We all talked over the sale of this stock for some little time, and arrived at an agreement, that they were to pay $41,000 for the $71,000 of stock, and were to indemnify me against any deeds of trust, or anything the company held against me; and also were to cancel some notes that Mr. Mack held against me—a balance in Philadelphia. The two deeds of trust were on the Aetna and Eagle Brick Works, and were held by the Stewart estate and Mr. Silvers. They amounted to thirteen thousand some odd hundred—about $14,000. The Stewart $9,000 and the Silvers $5,000.

They said they would guarantee I would never be sued on the notes held by this man, and would indemnify me against my having to pay, and that I was clear of debt from the company, and didn't owe the company anything. (64) Mr. Mack and Mr. Boren were to pay off these deeds of trust. This conference took place at the Imperial Hotel in Steubenville, Ohio. The agreement was talked over walking down to the depot and was finally made at the depot. The trains met there. Mr. Vance going to Wheeling and James M. Porter and myself went back to New Cumberland, where I lived at that time. Mr. Boren and Mr. Lance staid at Steubenville. It was understood between Mr. Lance, Mr. Vance and myself that Mr. Lance was to come down here at the Exchange Bank the next morning to arrange about this stock, to complete the transfer—whatever there was to be done. Mr. Mack was to get the stock for $41,000. They were to get this $71,000 of stock for $41,000. They were to take care of these deeds of trust. I was never to be sued on them by the company, and they would indemnify me against any debt of the company;

that I didn't owe the company a dollar at the close of this transaction, and the Philadelphia notes were to be cancelled. I wanted 65 cents a share for the stock when we first met there, and they offered me $41,000 for the $71,000, and I wouldn't agree to that without they would agree to wipe this indebtedness out of the company. The bank and myself arranged about the difference between 60 cents that I claimed for the stock and what this $41,000 would be to the bank. That was arranged between us. They got the stock on the above condition.

These gentlemen have not complied with their agreement they made that day. They paid off the deeds of trust, but they have sued me for them. They sued first in Steubenville, Ohio. They never returned the Philadelphia notes though, which they agreed to do, as part of the agreement. At that time there was a $15,000 lot of stock held by the John Porter Company. They were to get that. They were to hold that stock, that is, the John Porter Company.

(65) Plaintiff here put in evidence the record of the Steubenville suit, showing, among other things, that the John Porter Company, plaintiff, on the 30th day of June, 1892, brought suit against John Porter, defendant, at Steubenville, in the Common Court of Pleas, Jefferson county, Ohio, in which suit the plaintiff filed its petition, setting forth two causes of action, as follows:

First. Claiming from the defendant the sum of four hundred and eighty-six and twenty-four hundredths dollars ($486.24), with interest from the 19th day af January, 1892, on open account for certain brick, etc.

Second. Claiming, that on the 10th day of April, A. D. 1890, the defendant, John Porter, in consideration of the sum of two hundred thousand dollars ($200,000) to him paid by the plaintiff, conveyed to said plaintiff, the John Porter Company, by deed in fee simple, a large amount of real estate, and covenanted with the John Porter Company that he would warrant generally the property in said deed described and conveyed; that at the time of the making and delivery of said deed the premises conveyed were subject to the aforesaid Silver's and Stewart deeds of trust; that said plaintiff was compelled to and did pay off the said deeds of trust, amounting to $13,779.74; that no part of the said sum has been repaid to the said plaintiff; that on the 9th day of May, 1891, the said defendant, John Porter, as a guarantee that he would pay off and discharge said indebtedness secured by said two deeds of trust and have same cancelled within the period of nine months, ex-

ecuted and delivered to the plaintiff his certain promissory note for ten thousand dollars ($10,000), payable at the ex-
(66) piration of the said nine months, to the order of the plaintiff, at Steubenville National Bank, Steubenville, Ohio; that the said John Porter, as a pledge for the payment of said promissory note, delivered to the plaintiff 150 shares of the capital stock of the John Porter Company of the par value of $100 each, making $15,000; that the defendant has not paid the indebtedness secured by said two deed of trust, nor the said promissory note, nor any part of the same. Plaintiff prayed that the account might be taken of the amount due it from the defendant; that the said $15,000 of stock and the property attached in the case might be sold for execution, and for other necessary equitable relief.

The said record further showed as follows:

That the original summons to answer in said case was duly served on the said John Porter on the 30th day of June, 1892; but afterwards, on the 14th day of January, 1893, the said John Porter filed in the clerk's office of said court an answer in the case, setting up a setoff for the volue of certain ratchets and chains worth $100; that on February 2d, 1893, the cause was tried to the court, neither of the parties demanding a jury, but the same being waived by both parties, and that the court found that there was due from the defendant to the plaintiff on its first cause of action (after allowing the defendant the amount of the setoff of $100) the sum of $400; and that there is due to the plaintiff from the defendant, John Porter, on its second cause of action, the sum of $14,372.27, and the court gave judgment against the said John Porter for the sum of $14,772.27, with interest from the first day of the term at which the judgment was rendered, and costs.

The said record further shows that the court appointed
(67) James C. Bigger as a special Master Commissioner to sell the stock amounting to $15,000 held in pledge as aforesaid as upon execution against personal property; that the said stock was sold by the special Master Commissioner at Steubenville, Ohio, on the 21st day of February, 1893, to DeHaven Lance for $5,700, and the court found that after crediting the proceeds of such sale on the plaintiff's judgment that there was a balance due upon said judgment, including interest to February 21st, 1893, of $9,190.63 (nine thousand one hundred and ninety and sixty-three hundredths dollars), bearing interest from February 21st, 1893, and awarded execution for the same.

The witness proceeded:

I was sued again with reference to this matter in the Circuit Court of Hancock county, West Virginia.

The plaintiff here put in evidence the record of that suit, showing, that on May 3d, 1894, the Mack Manufacturing Company began said suit last mentioned in debt; that on May 7th, 1894, John Porter accepted service of the summons therein against him; that the declaration therein set forth as the cause of action the judgment obtained in the Common Pleas Court at Steubenville, Ohio, hereinbefore mentioned; and that on July second, 1894, the defendant, John Porter, failing to appear, the plaintiff, Mack Manufacturing Company, recovered judgment against the defendant, John Porter, for nine thousand nine hundred and forty-one and twenty hundreths dollars ($9,941.20), (aggregate of said balance of $9,190.63 due on said judgment of the Court of Common Pleas aforesaid, and interest thereon from February 21st, 1893, to July 2d, 1894,) with interest thereon from the second day of July, 1894, until payment, and $30 20 costs in the Circuit Court of Hancock county (68) aforesaid; that on July 7th, 1894, execution was duly issued on said judgment, which, on August 6th, 1894, was returned as follows: "No property could be found from which this execution could be made."

Continuing JOHN PORTER testified as follows:

The John Porter Company has changed its name to the Mack Manufacturing Company between the time of recovering the judgment in said Court of Common Pleas and the institution of said action in debt in the Circuit Court of Hancock county, West Virginia.

There was another suit brought against me by the Mack Manufacturing Company in the Circuit Court of Hancock county, West Virginia, in chancery. That suit is now pending there to sell my real estate, which is now in the possession of the Mack Manufacturing Company. It is in the hands of a receiver and leased to the Mack Manufacturing Company as the highest bidder.

Cross-Examination.

As to the difference between the $41,000 and $60 a share it was arranged that evening that the bank should pay me this difference, which is $1,600. I heard Mr. James M. Porter's testimony that I would not consent to the 710 shares being sold for $41,000, except on condition that Mr. Boren would take the stock he held as collateral for what I

owed him, at $65. Mr. Boren said he would take the $15,000 of stock at 65 if I would let Mack have the other at $41,000. It was part of the condition of my selling my stock that I would let Mack have the 710 shares at $41,000 if Boren would give $65 for the $15,000 of stock of mine which he held as collateral security for what I owed him. Yes, sir, the bargain that I made that evening was that I (69) was unwilling to sell my 710 shares of stock for $41,000 unless Boren and Mack would assume to indemnify me against the Silver and Stewart trust deeds, and that Boren and Mack would contract that Mr. Mack would cancel and return the note for the Philadelphia debt, and that Mr. Boren would give 65 cents for the stock which he held as collateral. If that was all done I was willing to sell the 710 shares for $41,000, and not otherwise.

I filed a bill to enjoin that suit on that judgment up in Hancock county, the record of which I put in evidence here. That bill was filed last summer. When I filed that bill I had no knowledge that Mr. Boren was engaged in the business of the company when he made the agreement in Steubenville alleged in the bill, except the fact that he was an officer of the company when he made the contract.

The said bill was put in evidence as follows:

## BILL OF INJUNCTION.

To the Honorable Joseph R. Paull, one of the Judges of the Circuit Court of Hancock County:

The bill of complaint of John Porter, plaintiff, against Mack Manufacturing Company, John M. Mack and G. B. Boren respectfully showeth: That the said Mack Manufacturing Company is a corporation created and existing under the laws of the State of W. Virginia, resident therein and doing business in the said county, its principal business being the mining of fire-clay and the manufacturing of the same into fire bricks and other products; that said company was originally incorporated under the name of "The John Porter" Company, and for a number of years did business under said name; but, in the month of January, 1894, through due and proper proceedings to that end, the name of said company was changed to that of Mack Manufacturing Company. Plaintiff was one of the origi- (70) nal incorporators, and at the time of the dealings and transactions with the defendants, hereinafter set forth as grounds for relief, was one of the stockholders of the said "The John Porter Company," he being at the commencement of said dealings the owner of some 1,000 shares of the stock of said company, of the par value of $100 each,

and the number of the shares of the stock of said company being in all 2,000. In the month of April, 1890, plaintiff sold to the said "The John Porter Company" two certain brick manufacturing properties situated in the said county, respectively called the "Eagle Fire Brick Works" and the "Aetna Fire Brick Works," the defendants Mack and Boren being at the time stockholders in said Company. At that time, April, 1890, there was a considerable trust deed lien indebtedness existing against the two last named properties, for the payment of which plaintiff was personally bound. With a view to provide for the payment of the said lien indebtedness, and the removal of the incumbrance thereof from the said last-mentioned properties of the said The John Porter Company, the plaintiff met with the said John M. Mack (who appeared and was represented in that behalf by one DeHaven Lantz, secretary of said company), G. B. Boren, James M. Porter and J. N. Vance in the city of Steubenville, Ohio, about in the month of December, 1891, said meeting being by arrangement of the said parties there present and represented, at which meeting, after certain affairs of said company had been discussed, and especially the matter of the said liens and incumbrance upon said properties, it was then and there agreed by and between the plaintiff and the said G. B. Boren and said John M. Mack (represented as aforesaid by said Lantz, his duly authorized agent, in that behalf) that in consideration of the trans-
(71) fer of stock of the said The John Porter Company to the said Boren and Mack by the said plaintiff of the par value of $15,000, and in the further consideration of the low price at which the plaintiff had at said meeting agreed to sell to said John M. Mack $71,000 worth of stock at par value of the said The John Porter Company, the said Boren and Mack would indemnify the plaintiff against said liens and encumbrance, and would pay off and discharge the same and release the plaintiff from all liability therefor, and the said $15,000 of stock should thereupon become the property and stock of the said "The John Porter Company." Said lien indebtedness at that time consisted of about $9,000 on the Eagle Works due to Mary A. Stewart and others, and about $5,000 on the Ætna Works due to D. S. Silver. In pursuance of the said agreement the plaintiff thereafter assigned and transferred stock of the said John Porter Company at par value of $15,000 to the said Boren and Mack; and, thereupon, afterwards, as plaintiff is informed and believes, the said The John Porter Company paid off the said liens and incumbrances. Plaintiff avers and says that, at the time said agreement

was made, the said Boren and Mack were large stockholders in the said The John Porter Company; were officers and directors of the same, the said Boren being general manager thereof, and said Mack president, and when they so undertook, as aforesaid, to indemnify and pay as stated, they did so for and on behalf of said company in its interest, and whilst so engaged in the business of the said company. Of said agreement the said company had full notice, and it afterward assented to and adopted and ratified it by making payment as aforesaid, and by taking the said $15,000 of stock and applying and using the same for its own benefit and purposes. After said payment had (72) been so made, the plaintiff, under the terms and by virtue of said agreement became (as the defendant, Mack Manufacturing Company, whether under its present or former name, very well knew and had assented to) wholly released and discharged from all liability for any part of said indebtedness, either to the defendant, Mack Manufacturing Company or its predecessor, The John Porter Company, or to any other. Yet the defendant, Mack Manufacturing Company, wholly disregarded its duties and obligations under said agreement, and regardless of the rights and equities of the plaintiff, seeking a forum that was the residence neither of itself nor of the plaintiff on the day of , 189 , instituted a suit at law in the Court of Common Pleas of Jefferson county, Ohio, against the plaintiff for the recovery of the amount paid by it in paying off said liens and incumbrance, and such proceedings were had in said suit that on the 2d day of February, 1893, the said Mack Manufacturing Company recovered a judgment against the plaintiff (defendant in that suit) for the sum of $14,772.27, with interest thereon from the 31st day of January, 1893, and $66.74 costs. Plaintiff says that, although he had good defense in equity to said suit, in the facts and matters shown in this bill, yet he was unable to avail himself thereof, because such facts and matters are cognizable only in a Court of Equity. Thereupon afterwards the said Mack Manufacturing Company commenced an action at law to May Rules, 1894, in your honorable Circuit Court of Hancock county, which said action is formally in debt to recover of the plaintiff (defendant therein) upon the said judgment in the Common Pleas of Ohio.

Plaintiff avers and says that by reason of the facts and matters hereinbefore stated and shown it would be in- (73) equitable and unjust that the said Mack Manufacturing Company should have judgment in the said action in your Circuit Court, and be thus enabled to enforce the said

judgment obtained in the State of Ohio, and inasmuch as ihe plaintiff is remediless in the premises at law, and that the said facts and matters constitute a case in which the plaintiff can have relief in a Court of Equity only, he thereupon, prays your honor to award an injunction to restrain the said Mack Manufacturing Company and its attorneys from further proceedings in the said last named pending action at law, and from further proceeding to enforce the said judgment obtained by it in the Court of Common Pleas of Jefferson county, Ohio, and from all and any other proceedings in this or any other court for the recovery from the plaintiff of any part of the said lien indebtedness and incumbrance paid or payable by it, and that the plaintiff have all such other and further relief as in the premises a Court of Equity may grant, and he will ever, &c.

JOHN PORTER,
Plaintiff,
By R. G. RICHARDS and
J. R. DONEHOO,
His Sol'rs.

STATE OF WEST VIRGINIA, } ss.
County of Hancock. }

John Porter, the plaintiff named in the foregoing bill, being duly sworn, says that the facts and allegations therein contained are true (except so far as they are stated therein to be on information), and that so far as they are therein stated to be upon information, he believes them to be true.

JOHN PORTER.

Taken, sworn to and subscribed before me this 25th day of June, A. D. 1894.

J. H. ATKINSON,
Notary Public.

(74) Mr. Boren and Mr. Lance did tell me that they could not act on behalf of the company, and were not authorized to act for the company. They told me that at Steubenville in that interview. They told me then and there they could not act on behalf of the company. Mr. Boren and Mr. Mack agreed at Steubenville to indemnify me for anything that I owed the company over and above these deeds of trust liens; all of my indebtedness to the company was to be cared for by them and wiped out. They guaranteed

me I would never be sued, and they would indemnify me against anything which I owed the company, the amount over and above the deeds of trust which the company afterwards took judgment for. This last mentioned bill was sworn to and filed about the 25th of June, 1894. The $15,000 of stock, which was held as collateral, wasn't transferred to Boren and Mack. That was a mistake in the bill. I read the bill before I swore to it.

I bought, I think, $5,000 of stock from Mr. Pope at $60 per share. Mr. Boren took this stock finally. I bought some of this stock also at $60 from Mr. Boyle. There was $20,000 of it. Mr. Mack offered me $1,000 cash if I would give it to him. That was 5 per cent. advance. Mr. Mack did come to me before this bargain and offered to sell me all of his stock for $50 a share, but it was all a bluff. He knew I couldn't buy the stock. He knew I wasn't able to do it. I think that my relatives and I did own a majority of stock at that time in that company when Mr. Mack made that offer. I think that I and those who were acting with me controlled the majority of the stock up to the time of the sale of this $71,000 to Mr. Mack in December, 1891.

RE-DIRECT EXAMINATION.

(75) This last mentioned offer of Mr. Mack to buy my stock at 60 cents on the dollar was, I think, some time in the summer of 1891. He bought in this Philadelphia stock at 25 cents on the dollar in September, 1891.

The plaintiff, to further sustain the issue upon his part' offered so much of the proceedings in chancery pending in the Circuit Court of Hancock county, West Virginia, in which the Mack Manufacturing Company was plaintiff and John Porter and others were defendants, for the purpose of showing that the Mack Manufacturing Company had sued John Porter in the State of Ohio and obtained a judgment for $9,190.63, with interest from February 21st, 1893, until payment, which is set out and described in that bill as the basis of that proceeding, including the order appointing a receiver in that cause; to this the defendant objected unless the whole record of the chancery cause pending in Hancock county should be admitted. And thereupon the court decided that the entire record should go in if the defendant required it, and the record was offered as evidence in the cause. And in lieu of that the counsel agreed upon the following compendium of the said record:

On the 21st day of Augusr, 1894, the Mack Manufacturing Company sued out a summons in chancery against

John Porter and others in the Circuit Court of Hancock county, West Virginia; that the plaintiff's bill in said cause was duly filed at September rules, 1894, the defendants having been regularly summoned to appear; that the summons to answer said bill was served on John Porter in person on the 27th day of August, 1894; that a number of the defendants who were non-residents of the State of West Virginia were served by the publication according to law, (76) which stated the object of the suit to be as follows:

The object of this suit is to have an account taken *an* reported under decree of said court of the real estate to which the defendant, John Porter, is now or has been possessed or entitled, and of the amounts and priorities of the liens thereon, to have the real estate subject to the lien of the plaintiff's judgment against said John Porter, rendered by said court on July 2, 1894, for $9,941.20, with interest thereon from the last named date until payment, and its costs, sold under decree of said court and such judgment paid off and satisfied out of the proceeds of such sale, to enjoin the defendant, John S. McNutt, his servants and agents, from operating the Kenilworth brick yard property, to have a special receiver appointed to manage same until it can be sold under the order of the court, to enjoin Oliver S. Marshall, trustee, from selling property of said John Porter, now being advertised by such trustee for sale, to have said McNutt answer the bill and disclose the terms of his lease of said brick-yard and the disposition made and to be made of the rent thereunder, filing the lease or a copy thereof, and for general relief.

That the bill set forth that the defendant, John Porter, was the owner of various tracts of real estate in Hancock county, and that various liens existed on said tracts, and also liens by divers judgments to different parties included among the defendants in said case; also stating the said judgment of the defendants, Mack and Boren, and the issue of the execution hereinbefore named and the return of "no property" thereon; that about two weeks before the said bill was filed at September Rules, 1894, the said John Porter, being entirely insolvent and aware that the plaintiff and other creditors of John Porter (77) would proceed very soon to enforce their liens against his real estate, made the lease aforesaid of the Kenilworth Brick-yard; that the real estate aforesaid, upon which the plaintiff's said judgment is a lien, is not of sufficient value to satisfy the prior liens thereon and plaintiff's said judgment; that the said John Porter is insolvent, has no personal proparty, and that the only way for plaintiff to make

any part of its said judgment is out of his real estate; that under two of the deeds of trust above mentioned the trustee had advertised for sale three tracts of the real estate of the said John Porter. And that the plaintiff in the said bill prayed that an account might be taken of the real estate to which said John Porter was possessed or entitled, and of the debts and liens existing against such real estate, with the amounts and priorities thereof; that the sales advertised be enjoined; that such real estate might be sold under the decree of court and the plaintiff's judgment paid off and satisfied out of the proceeds of such sale; that a special receiver might be appointed to manage and operate the brick-yard property, part of such real estate, and for general relief; that on January 22d, 1895, William McDonald, Esq., was appointed such special receiver, and qualified as such, with power to lease the brick-yard property; that the said John Porter did not answer, plead or demur to said bill and on December 28th, 1894, an order taking the bill for confessed as to John Porter and referring the cause to a commissioner in chancery was entered by the court for accounts as prayed, and that the special receiver was authorized to lease the brick-yard property aforesaid, and leased the same to the Mack Manufacturing Company for the term of , who are now in possession of the property as such lessees, and that a report of said commissioner in chancery had been made March 15th, 1895, in the cause under said order of reference, as required thereby, showing the total value of the real estate of John Porter to be $32790, and that the liens (78) on the same were $56900.

PLAINTIFF RESTED.

Counsel for defendants moved the court to exclude plaintiff's evidence in this case on the ground that the contract declared on here is not by any manner of means the contact which the evidence of the plaintiff tends to prove.

Counsel for plaintiff moved the court to permit the the plaintiff to amend his declaration as follows by inserting therein (after the words therein "that the said fifteen thousand dollars held by the said John Porter Company should belong absolutely to the said company") the following

AMENDMENT:

"and in further consideration that the plaintiff should sell to the defendant, Boren, and the said defendant, Boren, should purchase from the plaintiff $15,000 of stock of the

said John Porter Company at the price of sixty-five cents on the dollar."

The plaintiff's counsel further moved for permission to amend the declaration by inserting therein (after the words now therein, "the said defendants also undertook and agreed to and with the said plaintiff that the note of the said plaintiff held by the said John M. Mack, on which about four thousand dollars remained due, should be cancelled and returned to the said plaintiff") the following

AMENDMENT:

(79) "and the said defendants also undertood and agreed to and with the said plaintiff that an indebtedness of the plaintiff to the said John Porter Company on an open account, the amount of which was not then definitely known, should be cancelled, and that the said defendants would pay off the same and that the plaintiff should never be sued therefor, but was then and there free from the same."

EXCEPTIONS 2 AND 3.

And the defendants counsel then and there objected to the plaintiff being permitted to make said amendments, or either of them, which objections were severally overruled by the court, to each of which rulings and judgments of the court respectively the defendants then and there excepted.

Whereupon the defendants moved that this cause be continued for trial at another term of the court, because said amendants having been made, they were entitled to such continuance on account thereof.

EXCEPTION 4.

But the last mentioned motion was then and there denied and overruled by the court, and to the said ruling and judgment of the court the defendants then and there excepted.

And thereupon the said defendants, John M. Mack and G. B. Boren, to prove and maintain the said issue on their part called as a witness, DEHAVEN LANCE, who being duly sworn, testified as follows:

I reside at Philadelphia, and my present employment is selling brick. I have no connection whatever with the Mack Manufacturing Company, and am not in the employ-

ment nor connected in any way with Mr. Mack or the defendant, G. B. Boren. I left the employment of the Mack Manufacturing Company a year ago last September. Was first employed by the company January 27th, 1892. I was secretary of the company. In October, 1891, I had been in (80) the employ of Mr. Mack, and at that time Mr. John Porter was hurt, and at that time Mr. Mack sent me out West here to aid Mr. G. B. Boren, the General Manager and Treasurer of the Company, to aid in disposing of the product of the Company's Works. I bought some stock from Mr. McCoy at private sale at $60 a share about the middle of December, 1891. I bought 710 shares of stock in the John Porter Company from J. N. Vance, President of the Exchange Bank of Wheeling. I first spoke to him about it at Wheeling, W. Va. I represented in my negotiations, John M. Mack.

Defendants' counsel asked the question: "At whose solicitation?"

The COURT. "What is the object of this?"

Defendants' counsel. "It is leading up to this contract. If Your Honor, please, this gentleman represented Mr. Mack, and it is part of the negotiations belonging to this very contract of sale."

Objected to by plaintiff's counsel.

The COURT. "Objection sustained. What occurred between Mr. Vance and Mr. Lance in the commencement of the negotitations for the purchase of this stock, Mr. Lance being the agent of Mr. Mack, cannot be admitted as evidence in the absence of Mr. Porter.

EXCEPTION 5.

To which ruling and judgment of the court defendants then and there excepted.

The witness, DEHAVEN LANCE, further testified:

On December first, 1891, Mr. Vance telegraphed me from Pittsburgh to New Cumberland to meet him at the Imperial Hotel at Steubenville. I was boarding at that hotel at the time. Mr. Boren went to the hotel with me from New Cumberland.
(81) James M. Porter took me upstairs in the parlor of the hotel. He commenced to talk about stock the John Porter Company held as collateral. I listened to him 3 or 4 or 5 minutes, and after he had gotten through I said:

"Mr. Porter, that is a matter I have nothing whatever to do with." He said the Stewart lien and the Silver lien and the stock should balance. It was a matter I did not understand very well, because I knew nothing about the affairs of the company. I wasn't connected in any way as an officer of the company, and didn't care to go into it, because I had no authority and no business to go into the affairs of the company. I came there on that telegram to see Mr. Vance. He said there was a purchase-money mortgage lien against the Eagle and against the Ætna Brick Works. He wanted the liens to be paid out of the collateral stock that was held by the company—this $15,000. I told him I had no business to interfere with the affairs of the company, that I had no authority, and if he had nothing more to say I would go down stairs, and I immediately went down. No one else was in the room but James M. Porter and myself.

I went down in the lobby of the hotel and took a seat on the east side of the office and sat there. Mr. Vance was walking up and down the lobby of the hotel, and he came over to me and said, "Did you fix this matter up?"

I said, "I have nothing to fix up, I came here to see you," and I asked, "Do you desire to sell that stock or accept my proposition?" I previously made a proposition to J. N. Vance, president of the Exchange Bank of Wheeling, that I would buy 710 shares of stock from him for $41,000—stock in the John Porter Company of the Exchange Bank of Wheeling. I did not know where they (82) got that stock from. I did not know how they held it. I knew the stock had been formerly held by the Exchange Bank of Wheeling, and I presumed as collateral for borrowed money.

Mr. Vance and I were alone sitting side by side. He said, "Wait a while," and I waited and we talked about general matters, and we waited there until they got ready to go to the train, and while we were waiting there Mr. John Porter came over and commenced to talk about Mr. Mack selling his stock in Philadelphia for a low figure. I told him that Mr. Mack had loaned him money, or had endorsed his paper, and was compelled to pay the money. I told him that Mr. Mack desired nothing but to be fair, and I said to him, "He will never prosecute you for that difference"—for the difference between the stock as it was sold in Philadelphia and the debt Mr. Porter owed Mr. Mack. He says, "That is only your say so." I says, "Mr. Porter, I will guarantee Mr. Mack will not prosecute you for that difference."

That stock was sold in Philadelphia to indemnify Mr.

Mack for endorsing some paper of Mr. Porter in the neighborhood of $9,000. The paper had gone to protest, and Mr. Mack had to pay the paper.

After I told Mr. Porter what I stated above he walked away, and walked over to the other side of the office, and Mr. James Porter and Mr. Boren were standing there. I I would glance over occasionally and see them—Mr. James Porter, Mr. Boren and Mr. John Porter. Mr. John Porter would walk off and he would walk back again. Mr. Vance was the gentleman that was sitting by me and did sit there until we left to go to the train, and I had no further conversation with either of the Porters until I left to go to the train. After I got out on the street Mr. John Porter and Mr. James Porter walked out. Mr. Vance got ready (83) to go, and asked me to go to the train. I objected; I didn't care to go, but he says, "Come along." Mr. Vance and I walked together and the others were ahead some 15 or 20 feet. They walked along to the C. & P. depot at the river and Mr. Vance and I walked behind. When we got near the depot the train had just pulled into it and the bell was ringing to start. Mr. John Porter (Mr. Vance and I stopped at the corner of the depot) came over and said, "Recollect, Lance, $60 a share for that stock." I says, "Mr. Porter, $41,000 for 710 shares of stock, that is all." That is the last word I had with Mr. Porter. He had to run to get into the train. He got on it and went to New Cumberland, where he lived I presume.

The question was then asked the witness: "Was any arrangement made then, Mr. Lance, for you to come to Wheeling to close this matter up with Mr. Vance, before Mr. Porter left?"

Answer. "No, sir."

Q. by the COURT. "Now, whether any arrangement was made at any time up there?"

Answer. "By Mr. Porter with me, do you mean?"

Question by the COURT. "Yes."

Answer. "No, sir."

Question by the COURT. "Were there any arrangements made by you with anybody else?"

Answer. "No, sir."

The witness then continned in answer to questions by the defendants' counsel:

I have given all that I can recollect that transpired between me and either of these Porter gentlemen in Steubenville that night.

The question was asked: "Now, what were those ar-(84) rangements, and with whom?"

Answer. "They were made with Mr. Vance at the depot."

And in answer to further questions by defendants' counsel the witness testified:

They were with Mr. Vance, of the Exchange Bank, and he simply said, "Come to Wheeling to-morrow and we will fix this matter up." The next day, in pursuance of that, I went to Wheeling, and I signed the contract for the stock for John M. Mack, and J. N. Vance signed for the bank. John J. Jones also signed the paper which has been put in evidence, dated December 1st, 1891. It was executed at the Exchange Bank of Wheeling; in the directors' room of the Exchange Bank. It was drawn up at Mr. Clarke's office by him.

Nothing was agreed on in relation to the payment of those two liens that James Porter spoke to me about at Steubenville. At that time I didn't agree to indemnify and save Porter harmless of those liens. I never would talk to James M. Porter or John Porter upon the matter. I had no authority from Mr. Mack to so indemnify. I signed that paper for Mr. Mack. I was an agent of Mr. Mack for that purpose.

After Mr. James Porter mentioned this matter to me, and I told him I had nothing to do with it, and wouldn't talk about mortgages and the business of the John Porter Company, I said nothing more to John Porter or James Porter at the hotel, except what I told you in relation to Mr. Mack's difference—$4,000, something in that neighborhood. I didn't speak 50 words to John Porter that night.

CROSS-EXAMINATION.

I was not authorized for Mr. Mack to agree about the (85) cancellation of these mortgage liens, nor to guarantee the cancellation of the Philadelphia notes.

I had no particular authority from Mr. Mack as regards these mortgage liens, and no particular authority about the Philadelphia notes. I did have a general authority about both. I had a general authority to do business for Mr. Mack. In these negotiations about these shares such negotiations come under general authority, not under special authority. It was Mr. Vance who telegraphed me from Pittsburgh. Yes, I also bought some stock at the pulic sale in Steubenville. I don't own any stock now. I sold it to the John Porter Company. I bought it for myself. As near as I can tell I sold it thirty days afterwards. I bought it at sheriff's or master's sale with my own money furnished by the company.

I bought 10 shares of stock about the middle of December, 1891, from Edward McCoy, who was then bookkeeper for Mr. Mack. My motive was, in buying the stock, that I might be made secretary of the company, and hold and interest.

I didn't guarantee that the Philadelphia notes would be returned to Mr. John Porter by Mr. Mack. I simply said and told Mr. Porter I would guarantee that Mr. Mack would not prosecute him for that difference.

Whatever I said or did about that was done at the hotel. If, after we left the hotel, there was anything else under negotiation between me and Mr. Porter, it was not the matter of those Philadelphia notes. If, at the depot, I assented to anything else before those trains left, it was not the matter relating to those Philadelphia notes.

(86) RE-DIRECT-EXAMINATION.

Neither James M. Porter nor John Porter asked me at Steubenville there that night of December 1st, 1891, to guarantee the Stewart and the other mortgage on behalf of Mr. Mack, or to pay those mortgages and relieve Mr. John Porter.

When I said that I bought stock at the Master Commissioner's sale with my own money received from the company, I meant I bought the stock in my own name and paid for it by money furnished by the company. They gave me a check of the company made to my order and I endorsed it over and paid for the stock. I was there to purchase it, bid it in, in my own name without saying it was for the John Porter Company.

Mr. Mack has not, to my knowledge, prosecuted or sued Mr. John Porter for the balance of the Philadelphia notes.

RE-CROSS-EXAMINATION.

That stock was not really the company's when I bought it, that I know of. It was bought by the company's money, and I went there to buy that stock for the company at the solicitation of the company. I transferred it to the company about thirty days afterwards. I may have said that I sold that stock.

And thereupon the said defendants, to further prove and maintain the said issue on their behalf, called as a witness the defendant, G. B. BOREN, who being duly sworn, testifies as follows:

I live at Steubenville, and am general manager and

treasurer of the Mack Manufacturing Company, and have been since January 25th, 1891, such general manager; treasurer since May 9th, 1891. Mr. Mack was made president of the company in September, 1891.

(87) On December 1st, 1891, I was at New Cumberland, at the works and office of the company. I went to Steubenville that night. That was my home. I went there every night. During the day I had a telephone message from Mr. Porter for Mr. Lance and me to meet him and Mr. Vance at the Imperial Hotel upon the arrival of the accommodation train. He telephoned, "Come prepared to do business." He owed me a debt of $6,700, cash furnished him, and I had early in the year given him my individual notes that amounted to $6,200 besides the cash furnished him, making $12,900. These were accommodation notes. In order to procure money he solicited me to give him these notes, thas he could place them in bank and have them discounted. I had given him individual notes frequently. At the time of the settlement I had two notes in the Exchange Bank of Steubenville amounting to $3,200; one note in the Exchange Bank of Wheeling amounting to $1,000; one note in Sherrard, Mooney & Company's Bank of Steubenville amounting to $1,000, and I was a co-endorser with Mr. James Porter on a note at the Citizens's Bank amounting to $2,000.

I went to Steubenville that evening and met there Mr. John Porter, James M. Porter, J. N. Vance and DeHaven Lance. I had nothing to do with the sale of any stock wherein Mr. Mack and the Exchange Bank or John Porter figured. At Steubenville I went directly to the Steubenville National Bank and signed some papers, and from the bank I went immediately back to the hotel. When I arrived at the hotel Mr. DeHaven Lance was sitting in a leather chair on the east side of the hotel. J. N. Vance was walking up and down the corrider. I went up and spoke to Mr. Vance and DeHaven Lance, and I said: "Where are the Porters?" Mr. Vance replies, "up stairs." I went up stairs. John Porter and James M. Porter were (88) up there by themselves. Mr. James Porter immediately said to me: "We have come down here to try to settle this business all up," and went on to relate that he wanted to settle. Mr. Vance wanted to sell 710 shares of stock. James Porter was telling me this. They went on to relate what they wanted to do, wanted to sell those 710 shares of stock, which Mr. Vance afterwards sold to DeHaven Lance. James Porter said: "We'll sell you the 150 shares that you have hypothecated, of John Porter's, for the debt he owed you," and wanted to wipe out the

debt that Porter owed the company. I said to him: "Well, now, that can't occur; that can't be done; that's company business and will require a meeting of the Board of Directors of the company, and that can't be touched at all; the company's debt cannot be touched at all." Mr. James Porter said: "Mr. Boren, can't you and DeHaven Lance guarantee that that $15,000 of stock will pay that debt, and that John will never be sued?" I said: "Mr. Porter, if I would *would* guarantee that, I would have to take the stock and pay the debt. If DeHaven Lance would guarantee that, he would have to take the stock and pay the debt. I mean Mr. Mack would have to take the stock and pay the debt. Nothing can be transacted here to-night except personal business. I'll give you $65 per share for the $15,000 I have if you will take it." James Porter said: "We won't do anything unless it is all closed up." I don't know whether deeds of trust were mentioned or not, but it was debts that Porter owed the company that would include the deeds of trust. John and James Porter were both present, and James made the statement on behalf of John as I understood.

As to what the stock was worth at that time I was very anxious to give $65 for it in the kind of truck that I was paying in. I mean by that that Mr. Porter had $6,700 of my money that I couldn't get hold of, and he had dis-
(89) counted my paper in the different banks for $6,200 that I had to pay. I held $15,000 as collateral of the stock.

I had bought the same stock that summer for $60 per share. About that time, before that, James Porter had bought stock from John Porter that fall for forty cents on the dollar. The company owed a good deal of money at that time, in the neighborhood of $130,000.

I don't think the stock about December first, 1891, had any floating value; all I know about it is some individual transaction. The last individual transaction I know of was in the fall of 1891, the transfer of $5,000 of stock from John Porter to James Porter at $40 per share.

I think I have told all that occurred up there, up stairs in the Imperial Hotel, Steubenville. We then came down stairs. After that there was a general all around rabble. I mean by that all talking; John Porter, Mr. James Porter and myself, and occasionally Mr. Vance mixed in with it.

I can't recall a great deal of that conversation. There was a good deal said about Mr. Mack selling. Mr. Porter had a great hobby that Mack had sold his stock in Philadelphia; that was one of the hobbies he had. That you

would hear on all occasions when you talked to him. That seemed to be a great ground of complaint. Mr. John Porter talked a good deal about that—about the value of that stock being more than sixty cents. He was hanging out for 65.

The defendants then and there offered to prove by the witness on the stand that after the sale was made at Philadelphia, and before December 1st, 1891, Mr. Mack, in the hearing of this witness, offered to Mr. John Porter to restore the stock sold at Philadelphia to John Porter if he would pay the amount of the debt which John Porter (90) owed to him, Mr. John Mack.

EXCEPTION 6.

And the plaintiff then and there objected to the defendants being allowed to prove the matters involved in said offer; the court sustained the objection, and to said ruling and judgment of the court the defendants then and there excepted.

The witness, G. B. BOREN, continued: I notified Mr. John Porter a week or ten days before the sale of the stock in Philadelphia that it was to be sold on a certain day. He said, "He'll not sell it."

Counsel for defendants then asked the witness the following question:

"State wheter or not you heard any further notice given to him by Mr. Mack."

EXCEPTIONS 7.

This question was objected to by counsel for plaintiff; the objection was sustained by the court, and the defendants then and there excepted to such ruling and judgment.

Counsel for defendants offered to prove by the witness on the stand that on the day before that sale Mr. Mack gave notice to John Porter at New Cumberland that he had better go to that sale and protect his interest the next day; that that stock would be sold, and that this occurred in the hearing of this witness.

EXCEPTION 8.

The plaintiff's counsel objected to the admission of the proof so offered; the objection was sustained, and to the said ruling and judgment of the court the defendants then and there excepted.

(91) Defendants' counsel further offered to prove by the witness on the stand that before that stock was advertised for sale, the notes indorsed by Mr. Mack were sent out there by Mr. Mack to Mr. Boren at New Cumberland, W. Va., with the request to see Mr. John Porter, and ask him to settle this thing up, after the notes had been protested, and that he did see Mr. Porter, and that Mr. Porter failed to make any arrangement. That the last of these notes came due in June, 1891, and that this sale took place in September, 1891.

EXCEPTION 9.

Plaintiff's counsel objected to the proof offered being admitted, the court sustained the objection, and to said ruling and judgment of the court the defendants then and there excepted.

The witness continued: There was no contract made that evening at that hotel or before the train left in my presence, nor by me.

We remained there at the hotel from an hour to an hour and a half, and then walked to the depot. I walked to the depot with the two Mr. Porters. Going down to the train Mr. John Porter was contending that his stock was worth more money than was being offered for it, and that he would take 60, but he ought to have more. I don't think there was anything said about the Philadelphia stock on the way to the train.

The two Mr. Porters went away first north up the river on this train that night. Before they went away no other arrangements were made for any further meeting of any of the Porters.

Prior to the departure of these two gentlemen, Mr. Vance and Mr. Porter, there was not any arrangement made in reference to the sale of these 710 shares of stock.

As to a conversation between me and Mr. Stewart, Mr. (92) Stewart had made a demand off of company for $12,000 of a mortgage that he claimed the company owed, and I claimed that we didn't. He claimed there was $12,180 due on the Stewart mortgage on the Eagle Brick Works. He made a statement, a bill of it, and we met at the courthouse at New Cumberland for the purpose of adjusting or determining what was still due of this purchase money on this Eagle Works, and Mr. John Porter met there also with us, I showed him that there was only $9,000 secured by that mortgage, and no doubt I told him we were compelled to pay that mortgage. I never told Mr. Stewart that we

had bought the stock from Mr. Porter and were responsible for the mortgage. "Bought" was never used, because we never did it. This $15,000 was pledged with our company to secure a note of $10,000 that Mr. Porter claimed was due against the two pieces of property. He claimed that there was about $9,000 due against the two, and some interest, and the note was made $10,000, this $15,000 was put up as collateral, and at the time I was talking to Mr. Stewart this note was not yet due. As to my telling him that the company had the stock and his saying to me that he thought it unjust that they should not pay this mortgage, I don't recollect that. I don't have any recollection of that kind of a statement.

Whereupon the court and the jury were duly adjourned until the next day, being Wednesday, April 17th, 1895, when the trial was resumed, the same witness, G. B. Boren, was re-called, and the defendants showed by his testimony to the court and jury as follows:

On the 9th of May, 1891, Mr. John Porter and I were members of the Board of Directors of The John Porter Company.

Counsel for defendants offered in evidence a portion of the proceedings taken by the Board of Directors at the (93) office of The John Porter Company on the 9th of May, 1891, showing that at that time it was agreed between the company and Mr. John Porter that the company would assume and pay those deeds of trust securing the Silvers debt and the Stewart debt. The portion of the minutes offered in evidence is as follows:

"OFFICE OF THE JOHN PORTER COMPANY,

NEW CUMBERLAND, W. VA., May 9th, 1891.

A meeting of the Board of Directors of The John Porter Company was held this day in the company's office. Present: John Porter, president; G. B. Boren and R. E. Lindsay. Mr. John M. Mack had due notice of the meeting, but was not present.

Mr. John Porter tendered his resignation as treasurer of this company. Said resignation was, on motion of Mr. Boren, accepted.

The following resolution was offered, to-wit: Resolved, that the office of treasurer be and is hereby established, and that whoever is *is* elected thereto shall give bond to this company in the penal sum of ten thousand dollars ($10,000), conditioned on the due accounting for and pay-

ing over of all moneys which shall come to his hands as such treasurer, and for the faithful performance of his duties as such treasurer, said bond to be approved by the board of directors of this company. On motion of Mr. Boren the above resolution was adopted.

Mr. Lindsay then nominated G. B. Boren as treasurer; there being no other nominations Mr. Boren was duly elected.

Whereas, there are two deeds of trust now existing as liens upon certain property of this company, purchased by (94) it from John Porter, and for which he is desirous of indemnifying and securing this company against; the said John Porter tendered the company his note at nine months from date for ten thousand dollars ($10,000.00), with certificates for one hundred and fifty (150) shares in this company, with the power of attorney thereon endorsed duly signed as collateral security for such note; the company to assume and pay said deed of trust. It was, therefore, resolved, that said notes and certificates be and are hereby received and accepted, and that should said deeds of trust be paid off by said Porter, this company will surrender the note secured thereby to said Porter.

The said Porter is to sign hereafter a memorandum relative to such collateral certificates and deliver the same to the treasurer aforesaid as soon as same is received from Alfred Caldwell, the attorney for this company. On motion above resolution was adopted.

On motion of Mr. Boren it was ordered that this company borrow from fifty thousand to sixty thousand dollars, at 6% interest, to pay the company's debts and furnish it with working capital, and that the president of this company be instructed to take such steps as may be necessary to secure said loan.

On motion adjourned.

Approved

CHARLES E. POPE,

(Sept. 28, 1891.) Chairman.

Defendants' counsel further offered to prove, by the witness on the stand, that during the discussion of the resolution Mr. Porter asked, after the resolution was read in his presence, "Suppose that he paid this debt, these liens, off himself, what was to be done then?" That after that had passed, the words were added to the resolution, "And that should said deeds of trust be paid off by said (95) Porter this company will surrender the note secured thereby to said Porter."

Counsel for defendants stated that the purpose for which they made this offer was to explain what Mr. Boren had been talking about to Mr. Stewart; that Mr. Stewart testified that Mr. Boren told him in the middle of January that the company had assumed to pay off this indebtedness of John Porter on these liens, and had purchased Porter's stock. We want to show that the company had assumed to pay off these Silvers and Stewart debts, and that Mr. Boren had admitted to Stewart that the company and not Boren and Mack had agreed to pay these liens.

EXCEPTION 10.

The plaintiff's counsel objected to the defendants being allowed to prove this offer, the court sustained the objection, to which ruling and judgment of the court the defendants then and there excepted.

The witness, Boren, continued:

I recollect of meeting Mr. Stewart that day that he refers to in the middle of January at New Cumberland, at the courthouse, and I had a great deal of talk with him, and no doubt I did say to Mr. Stewart that we had to pay off these liens. I was there in the interest of the company to determine what these liens amounted to. My memory don't serve me as to whether I said to him that the company had to pay off these liens or not, and I don't remember of him repeating his story to me either. There is no doubt but what I told him we had to assume that debt.

Defendants' counsel offered to prove by the witness on the stand that, before the foregoing resolution was offered, Mr. John Porter represented that the Stewart and Silvers liens did not amount to over $9,000, and that that was the reason that the amount of the note mentioned in this reso-
(96) lution was fixed at $10,000, and that note was taken and that the lien at that time amounted to $14,000.

EXCEPTION 11.

The plaintiff's counsel objected to the evidence offered, the objection was sustained by the court, and to the said ruling and judgment of the court the defendants then and there excepted.

The witness continued: When I met Mr. Stewart at that meeting in January, I was not acting with reference to any affairs of my own, but altogether for the company.

Counsel for the defendants then asked the witness the following question:

"State whether or not the John Porter Company before that meeting in January with Mr. Stewart, in 1892, had assumed to pay off these Stewart and Silver liens."

The question was objected to by plaintiff's counsel, and the objection was overruled by the court.

The witness answered: "They had."
Q. "State when and where."
A. "At the meeting of the directors, May 9th."
Q. "What year?"
A. "1891."

The COURT: "You cannot prove this. I will allow to prove the simple fact that before that meeting of Mr. Boren in January with Mr. Stewart, 1892, the John Porter Company had assumed to pay off these Stewart and Silver liens."

EXCEPTION 12.

The defendants then and there excepted to the ruling (97) and judgment of the court excluding the evidence showing when and where such agreement had been made by the John Porter Company.

The COURT: "Then I will exclude it all."

EXCEPTION 13.

The defendants then and there excepted to the last mentioned ruling and judgment of the court.

The witness continued: I recollect having a conversation at the time and place Mr. Marshall referred to, when he was present with Mr. James M. Porter.

In that conversation James M. Porter didn't say a word to me with reference to Mr. Mack and myself having agreed to pay off the Silver and Stewart liens, or having agreed to indemnify him, John Porter, against these liens.

The object in my going there to that meeting was for the purpose of settling my personal account with John Porter in New Cumberland, in the West Virginia office. I demanded of him that he settle with me, and he refused to do it, and I said to him, "Unless you settle my account I'll sue you before the sun goes down to-morrow."

The plaintiff's counsel objected.

The COURT: "That is very improper for you to state, sir. He can tell the purpose he went there for, and that is all the court will permit him to do. This witness can con-

tradict that conversation so far as it is ligitimate and pertinent to the issues involved."

EXECPTION 14.

The objection was sustained to so much of the witness's last answer as in these words: "Unless you settle my account I'll sue you before the sun goes down," and to the last mentioned ruling and judgment of the court the de-
(98) fendants then and there excepted.

The witness continued: At that interview when Mr. Marshall was present with Mr. James Porter, which has been testified about, the matter of myself and Mr. Mack paying off, or having agreed to pay off the Silver and Stewart liens, was not referred to at all.

No sale of stock to me by John Porter was made on December 1st, 1891, at Steubenville.

The $15,000 of stock of John Porter held by me as collateral security for a debt of John Porter to me personally was sold to me a few days after the Steubenville meeting, and was transferred to me on December 4th, three days after the meeting at Steubenville. I gave $65 per share for it. Mr. John Porter attended the meeting of the stockholders of The John Porter Company in the latter part of January, 1892. I was there.

So much of the minute-book of the Board of Directors of The John Porter Company as contains the two stockholder's meeting of January 27th, 1892, and January 25th, 1893, were put in evidence by the defendants as follows:

January 27, 1892.

The regular annual meeting of stockholders in The John Porter Company was held at the Stewart House, New Cumberland, W. Va., this day, at 10 o'clock A. M.

A call of the list of stockholders being made, the following stock was found to be represented, to-wit:

| | | |
|---|---|---|
| John M. Mack, | 642 | shares represented by himself. |
| G. B. Boren, | 375 | " " " " |
| Exchange Bank of Wheeling, | 660 | " " " DeHaven Lance, Proxy. |
| John Porter, | 180 | " " " himself. |
| J. J. Shepard, | 63 | " " " " |
| James Porter, | 50 | " " " " |
| De Haven Lance, | 10 | " " " " |
| R. E. Lindsay, | 10 | " " " " |
| Total, | 1,990 | shares. |

This being a majority of the stock, the meeting was organized by calling De Haven Lance to the chair and and naming R. E. Lindsay as Secretary.

(99) The minutes of the last annual meeting were read and approved.

Owing to their great length, the minutes of stock meeting of September 28, 1891, relating to the issuing of bonds, their reading was, on motion of Mr. Mack, ordered dispensed with.

The report of the board of directors for the year 1891 was presented and, on motion, received.

On motion, ordered that we proceed to elect five directors for the ensuing year.

The chairman appointed G. B. Boren and James Porter to act as tellers.

A ballot was then taken, resulting as follows:

| | |
|---|---|
| John M. Mack, | 1,810 votes. |
| G. B. Boren, | 1,810 " |
| James Porter, | 1,760 " |
| De Haven Lance, | 1,760 " |
| R. E. Lindsay, | 1,810 " |
| J. J. Sheppard, | 50 " |
| John Porter, | 50 " |

The five gentlemen first named, to-wit: John M. Mack, G. B. Boren, James Porter, DeHaven Lance and R. E. Lindsay, having received the highest vote cast, were declared elected as directors for the enusing year. The following amendments to our by-laws were offered and adopted, to-wit:

1st. That in art. 4, sec. 1, the words Secretary be stricken out and the word Treasurer inserted, making the section to read: "Every stock certificate issued by the company shall be signed by the president and treasurer and sealed with the corporate seal of the company."

2nd. That in article 5, sec. 1, the word Secretary be stricken out and the word Treasurer inserted, making the section to read: "All notes issued by and for the use of the company shall be signed by both the president and treasurer."

John W. Chapman, a justice of the peace of this county, came before the meeting, and by him the five directors elected this day were qualified.

Adjourned.

Attest:

Sect'y Pro tem., DE HAVEN LANCE,
Pres't Pro. tem.

The regular annual meeting of the stockholders in The John Porter Company was held at their office in New Cumberland this day (Jan'y 25, 1893) at 10:30 A. M.

A call of the list of stockholders being made, the following number of shares were found to be represented.

| | | | | | |
|---|---|---|---|---|---|
| John M. Mack, | 1,032 | shares | represented | by | himself. |
| John Porter, | 180 | " | " | " | " |
| G. B. Boren, | 375 | " | " | " | " |
| James Porter, | 50 | " | " | " | " |
| Joseph P. Mack, | 50 | " | " | " | John M. Mack, proxy. |
| DeHaven Lance, | 10 | " | " | " | himself. |
| Total, | 1,697 | shares. | | | |

This being the majority of stock, the meeting was organized by calling G. B. Boren to the chair and naming (100) DeHaven Lance as secretary.

The reading of the minutes of the last annual meeting was, by resolution, dispensed with.

The report of the board of directors for the year 1892 was read and, upon motion of Mr. John M. Mack, was received.

Upon motion, it was ordered that the meeting proceed to name and elect five directors to serve the company during the year 1893.

On motion of Mr. John M. Mack it was resolved that DeHaven Lance cast one ballot for the election of the five directors.

The chairmna, after appointing John M. Mack and DeHaven Lance tellers, ordered the ballot to be case, which resulted as follows:

| | | |
|---|---|---|
| John M. Mack, | 1,517 | votes. |
| G. B. Boren, | 1,517 | " |
| James Porter, | 1,517 | " |
| Joseph P. Mack, | 1,517 | " |
| DeHaven Lance, | 1,517 | " |

The above gentlemen receiving the whole number of votes cast were declared elected by the chairman as directors for the ensuing year, Mr. John Porter refusing to vote for directors.

On motion, resolved that sec. 6 of article 2 of the by-laws be amended by striking out (and all directors shall, before acting, be duly sworn to well and truly to the best of their ability perform their duties as such directors). The section reading after amendment, Non-residents of the State of West Virginia, if stockholders, may be elected directors.

Vote upon the amendment as follows:

| Aye. | | Nay. |
|---|---|---|
| John M. Mack, | 1,032 shares. | John Porter, 180 shares. |
| G. B. Boren, | 375 " | |
| Joseph P. Mack, by John M. Mack, proxy, | 50 " | |
| DeHaven Lance, | 10 " | |
| Total, | 1,467 shares. | |

Being a majority vote, the motion was declared carried.

No further business appearing on motion adjourned.

JOHN M. MACK, Chairman. DEHAVEN LANCE, Acting Sect'y.

The witness continued:

John Porter was present at the meeting of January 27th, 1892. He voted the 150 shares of stock that was pledged with the company as collateral for the Silver's and Stewart liens, and thirty other shares still remaining in his name on the books.

He voted the same 180 shares of stock in the meeting of January 25th, 1893.

(101) There wasn't any understanding prior to the meeting at Steubenville, December 1st, 1891, by which Boren and Mack were to be indemnified by The John Porter Company in case they indemnified the company against the Stewart and Silver liens.

I can't fix the date when I first heard of any claim from Mr. John Porter that Boren and Mack had agreed to pay off the Silver and Stewart liens or to indemnify Mr. John Porter against the payment of those liens. It was either at our first annual meeting after the Steubenville meeting, or at our second annual meeting. I had seen Mr. Porter and talked with him frequently during the two months between the Steubenville meeting and the last of January when the first stockholders meeting mentioned was held. Mr. Porter did not talk to me any during those two months on the subject of his indebtedness on account of these Silver's and Stewart liens.

When John Porter first brought this matter up with me he claimed that Mack and I had assumed personally his debt to the company, and I denied that we had done so.

I asked him at that meeting in Steubenville, Decem-

ber 1st, 1891, to sell to me the stock which I held as collateral for John Porter's personal indebtedness to me, and he refused to sell it to me that night.

CROSS-EXAMINATION.

John Porter refused to sell it to me unless as a part of this whole deal that James had told me about. He did offer to sell it to me at 65 if Lance and I agreed to the rest of James' proposition. That is to say, James put at me what he said was the whole matter, that all these things they wanted to settle at once and together. Yes, sir; and a part of that was the sale to me of this stock which I held, (102) at sixty-five cents. Yes, sir; and then I say that Porter refused to sell me that stock at sixty-five cents unless I would agree to these other things. The record on the books is that three days after that I became the owner of that stock by transfer to me on the books. Yes, sir, on the 4th of December, three days after this meeting on the first, I was the owner of that stock. I held Porter's certificate at the time of this Steubenville meeting. It was signed with Porter's name on the back before that. Yes, sir, I had is transferred on the 4th, surrendered that certificate and got the stock transferred to my name and took out a new certificate in my own name for that stock. I had not in the mean while agreed to these other things that Porter said must be agreed to before he would sell at sixty-five. Had I agreed that Mack and I would assume that debt on the evening of the first at Steubenville he would have made the deal for sixty-five cents. Yes, sir, he declined to agree to it because I wouldn't agree to these other things. Yes, sir, and then on the fourth, three days afterwards, I had the stock transferred to me and credited him with sixty-five cents on the dollar for it.

I have thought over it and I wouldn't swear positively whether it was at the stockholders meeting in January, two months after this, or at the next annual meeting after that Porter may have made this claim to me that he is now making. John Porter did not at either the meeting of January, 1892, or January, 1893, vote the 150 shares of stock, which he held, for directors. No agreement of any kind was reached in the hotel to my knowlege, either between me and the Porters, or Lance and the Porters, or between Vance and myself and Lance and the Porters. No agreement of any kind was arrived at.

(103) Mr. John Porter referred in the hotel to this Philadelphia transaction of Mack's. Was complaining about it in the hotel. It was his hobby to mention it every five minutes.

I can't tell that he did mention it after we left the hotel. I would answer he did. That he mentioned it after he left the hotel, yes, sir. No, sir, I don't recollect that on the way down to the depot, and a few minutes before the train left, that that was the subject of conversation. Yes, I do recollect it was mentioned at the hotel. No, I won't say that it wasn't mentioned after we left the hotel. I don't recollect that I said yesterday, in answer to a question of Mr. Caldwell, positively that the Philadelphia matter was not mentioned after we left the hotel. I don't recollect of Mr. Porter talking about the Philadelphia business after we left the hotel, but he might have done it. I am willing to say that nothing was said about the Philadeldhia stock on the way to the train to my recollection and to my impression. I am willing to adhere to that now.

The sale of stock at forty cents by John Porter was to his brother James.

After we went down stairs in the hotel there was a general rabble. Lance talked to me, to Vance and to one of the Porters.

RE-DIRECT-EXAMINATION.

December 1st, 1891, there were 2,000 shares of capital stock in The John Porter Company or the Mack Manufacturing Company.

The shares of stock that John Porter sold to James he offered to sell me at forty cents.

RE-CROSS-EXAMINATION.

Before December 1st, 1891, my holdings of the stock (104) were 170 shares, and Mr. Mack's from 600 to 650. Together we owned less than half the stock. After Mack acquired the 710 shares of Porter's stock, he and I together owned more than half the stock in the company.

And the said defendants, to further prove and maintain the said issue on their part, called as a witness the defendant, JOHN M. MACK, who, being duly sworn, testified as follows:

In the month of December, 1891, I resided in Philadelphia. I was in the city of Wheeling some time in the latter part of the year 1891, before I purchased the 710 shares of stock which has been spoken of here; some considerable time before the consummation of the sale.

Counsel for defendants then asked the witness: "If

you saw Mr. Vance in relation to the stock in The John Porter Company, tell us what transpired."

Which question was objected to by plaintiff's counsel.

The COURT: Ask him if there was a conversation between him and Mr. Vance in relation to this stock that Vance held, or rather the bank held, but I don't think you can go into the contents of that conversation which occurred in the absence of Mr. Porter, as binding Mr. Porter.

Counsel for defendant says: The purpose is, of course, to prove a conversation which is a collateral one, but we think it has a bearing. The purport of this conversation has a bearing upon the subsequent transactions at Steubenville, as to the probability of one story or the other being true.

EXCEPTION 15.

The COURT: That may be. But it would certainly be unjust to bind Mr. Porter in his absence by a conference (105) that took place in his absence. The objection was sustained, and the defendants, by counsel, then and there excepted.

Defendants' counsel thereupon offered to prove by the witness on the stand that along about the month of December, 1891, he had an interview with Mr. J. N. Vance, president of the Exchange Bank of Wheeling, in the city of Wheeling, in which Mr. Vance proposed to him to purchase the 710 shares of stock which were purchased afterwards, and that Mr. Mack informed Mr. Vance that he would not make any offer for that stock or have anything to do with the purchase of the stock if Mr. John Porter had anything to do with it; that he would only enter into negotiations in relation to the sale of it if it was the stock of the Exchange Bank, and he asked Mr. Vance if the stock was the stock of the bank and owned by it, and Mr. Vance replied that the bank did own it.

Whereupon counsel for plaintiff objected to the evidence offered by the defendants being permitted to be introduced.

EXCEPTION 16.

The COURT: That is not permissible in this case. The objection sustained, and to the said ruling and judgment of the court the defendants then and there excepted.

Counsel for the defendants asked the witness as follows:

"State whether or not before the sale of this stock by the Exchange Bank to you—the 710 shares—you had refused to have any dealings in relation to it with the bank unless they owned the stock, and had informed the president of the bank that you would have nothing to do with the stock if Mr. Porter had any interest in it, and that prior to the interview of December 1st, 1891, and in the absence of Mr. Porter?"

(106) EXCEPTION 17.

Which questson was objected to by counsel for plaintiff, and the objection was sustained by the court; to which ruling and judgment of the court the defendants then and there excepted.

And thereupon the defendants closed their case, and this concluded the testimony in the case.

The plaintiff's counsel insisted that the five instructions given, on motion of the defendants, to the jury by the court should be embodied in this bill of exceptions, to which the defendants objected because so doing is improper and unnecessary, as the said instructions are not pertinent to the decision of any of the exceptions taken by and allowed to the defendants. But the court certifies that such instructions were given to the jury, on motion of the defendants, as follows:

1. The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worth of credit, and to give credit accordingly.

2. You are the judges of the credibility of the witnesses, and of the weight to be attached to the testimony of each and all of them; and you are not bound to take the testimony of any witness as absolutely true, and you should (107) not do so, if you are satisfied from all the facts and circumstances proved on the trial that such witness is mis-

taken in the matters testified to by him, or that, for any other reason, his testimony is untrue and unreliable.

3. In determining the issues of this case, you should take into consideration the whole of the evidence, and all the facts and circumstances proved on the trial, giving to the several parts of the evidence such weight as you think they are entitled to. And in determining the weight to be given to the testimony of the several witnesses, you should take into consideration their interest in the event of the suit, if any such is proved; their conduct and demeanor while testifying; their apparent fairness or bias, if any such appears; their appearance on the stand; the reasonableness of the story told by them, and all the evidence and circumstances tending to corroborate or contradict such witnesses, if any such are proved.

4. The court instructs you, that in passing upon the testimony of the witnesses (for the plaintiff) you have a right to take into consideration any interest which such witnesses may feel in the result of this suit, if any is proved, growing out of their relationship to either of the parties, and to give to the testimony of such witnesses only such weight as you think it entitled to under all the circumstances proved on the trial.

5. The jury are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact, or state of facts. In determining upon which side the preponderance of the evidence is the jury should take into consideration the opportunities of the several witnesses for seeing or knowing (108) the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial; and from all the circumstances determine upon which side is the weight or preponderance of the evidence.

And the jury then and there retired to their chamber to consider of their verdict, and further proceedings were had in this case as appeared elsewhere of record.

And for as much as the facts aforesaid and the decisions of the court thereon set forth in this bill of exceptions do not appear of record, the defendants pray that this, their bill of exceptions, may be allowed, signed and sealed, and it is allowed, signed and sealed accordingly.

J. J. JACKSON. [Seal.]

## PETITION FOR A WRIT OF ERROR AND SUPERSEDEAS.

(109) Filed July 15th, 1895.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS.

To the Honorable Judges of Said Court:

Your petitioners, John M. Mack and G. B. Boren, respectfully show that on the 24th day of September, 1894, proceedings were begun against your petitioners in the Circuit Court of Hancock county, in the State of West Virginia, by John Porter by an action at law in assumpsit; that such action was duly removed into this court, and that afterwards such proceedings were had that on the 15th day of July, 1895, a judgment, final in its nature, was entered by the said Circuit Court of the United States against your petitioners for the sum of ten thousand four hundred and forty-three dollars, with interest from the 15th day of July, 1895, until paid, and costs of suit.

An assignment of errors, setting our separately and particularly each error asserted and intended to be urged in the Circuit Court of Appeals of the United States for the Fourth District thereof, is herewith filed with the clerk of the said Circuit Court of the United States; and your petitioners pray that the proceedings aforesaid may be reviewed by the Circuit Court of Appeals of the United States for the Fourth *District* thereof; that a writ of error
(110) and supersedeas may be granted to your petitioners; that the above mentioned judgment may be reversed and annulled, and for such further and general relief as the case may require and to the court may seem meet.

JOHN M. MACK and
G. B. BOREN,
By CALDWELL & CALDWELL,
Their Attorneys.

## ASSIGNMENT OF ERRORS.

(111) Filed July 15, 1895.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

John Porter, Plaintiff and Appellee,
*vs.*
John M. Mack and G. B. Boren, Defendants and Appellants.

In the matter of the petition of the said John M. Mack and G. B. Boren, Appellants.

ASSIGNMENT OF ERRORS.

Then afterwards, to-wit: on the 15th of July, in the year of our Lord eighteen hundred and ninety-five, at the April term for eighteen hundred and ninety-five of the Circuit Court of the United States, in the city of Wheeling, in the State and District of West Virginia, comes the said John M. Mack and G. B. Boren, by George B. Caldwell and Alfred Caldwell, their attorneys, and say that in the record and proceedings in the above entitled matter and cause there is manifest error in this, to-wit:

I.

Because the Circuit Court aforesaid sustained the objection of the plaintiff to the defendants being allowed to introduce testimony as offered by the witness, J. N. Vance, that the original notes and writing also offered in evidence in this connection, from which the contract between the Exchange Bank of Wheeling, and John M. Mack, of the 2d day of December, 1891, (which had been put in evidence,) was prepared, were originally prepared on the sheets marked 1 and 2 by Mr. A. J. Clarke, attorney for the Exchange Bank of Wheeling: that said notes as originally (112) prepared were as follows:

"Agreement made this 2d day of Dec., 1891, between The Exchange Bank of Wheeling, of the City of Wheeling, W. Va., of the 1st part, and John M. Mack, of the City of Phila., Penna., of the 2d part—witnesseth:

Said bank agrees to sell to said Mack, who agrees to buy, 710 shares of the capital stock of "The John Porter Company" (incorporated) of New Cumberland, W. Va., now standing in the name of John J. Jones, trustee, for the sum of $41,000.00, to be paid as follows: $5,000.00 in cash; $5,000 in 30 days; $10,333 in 6 months; $10,333 in 12 months, and $10,334 in 18 months from this date—for

the deferred payments notes or accepted drafts to be given with interest.

Upon the payment of the said $5,000 in cash, sd. bank will transfer and deliver to said Mack 50 shares of said stock. Upon the payment of the said $5,000 and int. in 30 days, and of the said $10,333 in 6 months and int., said bank will transfer and deliver to said Mack 220 shares; upon the payment of $10,000 and int., in 12 months, said bank will transfer and deliver to said Mack 220 shares; and upon the payment of $10,334 and int. in 18 months, said bank will transfer to sd. Mack 220 shares, the residue of said 710 shares hereinbefore sold.

It is agreed that in the event that said Mack desires an extension of the payment of said $10,334, due in 18 months, said bank will extend the payment thereof for 6 months longer, said Mack paying interest therefor, and said bank retaining as collateral thereto said residue of stock.

Said Mack shall at any stockholders meeting of sd. Co. have the right to control the vote of the said stock so transferred to said bank (standing in the name of said John J. Jones, trustee,) and a proper proxy, from time to time, (113) will at his request be executed to carry out the said intention.

Said Mack shall have the right to anticipate the time of the payment of any of said deferred installments, interest to cease on the said installments when so paid, and stock to be then transferred as hereinbefore provided.

Witness the following signatures:

John J. Jones, trustee, in whose name said 710 shares of stock stand, in consideration of the foregoing agreement, agrees to carry out the same, he here declaring that he holds said stock for the use and benefit of said "The Exchange Bank of Wheeling," this 2d day of Dec. 1891."

That the said notes were submitted through Mr. De Haven Lance on the day they were prepared, the 2d of December, 1891, to Alfred Caldwell as attorney for Mr. John M. Mack, and that the additions were made in pencil by Mr. Caldwell in his own handwriting, as shown on page 3; that the said addition are as follows:

"Said bank hereby agrees to immediately have said 710 shares transferred to it upon the books of The John Porter Company by a transfer made and signed by John J. Jones, trustee, in whose name they now stand.

Should said Mack desire to substitute before its maturity for said note for $10,333 and int. at six months, a

note falling due at the same date with security thereon satisfactory to said bank, the said bank will accept said substitute note and surrender the said $10,333 note at six months first mentioned and transfer to the said Mack 220 (114) of said shares, provided the $5,000 and int. at 30 days aforesaid have been paid."

That said agreement was written on the typewriter in Mr. Caldwell's office from the notes prepared by Mr. Clarke, as amended by Mr. Caldwell, and after having been transcribed upon the typewriter were signed by Mr. J. N. Vance for The Exchange Bank of Wheeling and by Mr. Lance for Mr. Mack.

II.

Because said Circuit Court overruled the objection of the defendants to the plaintiff, being permitted to amend his declaration, and permitted the plaintiff to make such amendment thereto after the words therein, "that the said fifteen thousand dollars held by the said John Porter Company should belong absolutely to the said company," by inserting therein the following

AMENDMENT:

" and in further consideration that the plaintiff should sell to the defendant, Boren, and the said defendant, Boren, should purchase from the plaintiff $15,000 of stock of the said John Porter Company at the price of sixty-five cents on the dollar."

III.

Because said court overruled the objection of the defendants to the plaintiff being permitted to again amend his declaration, and permitted plaintiff to again amend the same by inserting therein after the words therein, " the said defendants also undertook and agreed to and with the said plaintiff that the note of the said plaintiff held by the said John M. Mack, on which about four thou- (115) sand dollars remained due, should be cancelled and returned to the said plaintiff," the following

AMENDMENT:

"and the said defendants also undertook and agreed to and with the said plaintiff that an indebtedness of the plaintiff to the said John Porter Company on an open account, the amount of which was not then definitely known, should

be cancelled, and that the said defendants would pay off the same, and that the plaintiff should never be sued therefor, but was then and there free from the same."

IV.

Because the said court denied and overruled the motion of defendants for continuance, because said amendments having been made, they were entitled to such continuance on account thereof.

V.

Because the said Circuit Court sustained the objection of the plaintiff's counsel to the question by defendants' counsel: "At whose solicitation?" referring to the commencement of negotiation for the sale of stock to the defendant, John M. Mack, and in the court ruling that what occurred between Mr. Vance and Mr. Lance in the commencement of the negotiation for the purchase of this stock, Mr. Lance being the agent of Mr. Mack, could not be admitted as evidence, in the absence of Mr. Porter.

VI.

Because the court sustained the objection of the plaintiff to the defendants being allowed to prove, as they offered by the witness G. B. Boren, that after the sale was made at Philadelphia, and before December 1st, 1891, Mr. (116) Mack, in the hearing of this witness, offered to Mr. John Porter to restore the stock sold at Philadelphia to John Porter if he would pay the amount of the debt which John Porter owed to him, Mr. John Mack.

VII.

Because the court sustained the objection of the plainto the question by counsel for defendants to the witness G. B. Boren:

"State whether or not you heard any further notice given to him (the plaintiff, John Porter) by Mr. Mack."

VIII.

Because the court sustained the objection of the plaintiff to the admission of proof by the witness, G. B. Boren, that on the day before the sale of stock in Philadelphia, Mr. Mack gave notice to John Porter at New Cumberland that he had better go to that sale and protect his interest the next day; that that stock would be sold, and that this occurred in the hearing of this witness.

IX.

Because the court sustained the objection of the plaintiff to proof being admitted, as offered by the defendants by the witness, G. B. Boren, that before the stock sold in Philadelphia was advertised for sale, the notes endorsed by Mr. Mack were sent by him to Mr. Boren at New Cumberland, West Virginia, with the request to see Mr. John Porter and ask him to settle this thing up, after the notes had been protested, and that he did see Mr. Porter, and that Mr. Porter failed to make any arrangement. That the last of these notes came due in June, 1891, and that this sale took place in September, 1891.

(117) X.

Because defendants' counsel having offered to prove by the witness, G. B. Boren, that during the discussion at a meeting of the Board of Directors of the John Porter Company, held at New Cumberland, West Virginia, May 9th, 1891, of the resolution offered at that meeting, after the resolution was read in the presence of Mr. Porter, as follows:

"Whereas there are two deeds of trust now existing as liens upon certain property of this company, purchased by it from John Porter, and for which he is desirous of indemnifying and securing this company against, the said John Porter tendered the company his note, at nine months from date, for ten thousand dollars ($10,000.00), with certificates for one hundred and fifty (150) shares in this company, with the power of attorney thereon endorsed, duly signed as collateral security for such note. The company to assume and pay said deed of trust. It was therefore resolved that said notes and certificates be and are hereby received and accepted, and that should said deeds of trust be paid off by said Porter, this company will surrender the note secured thereby to said Porter.

The said Porter is to sign hereafter a memorandum relative to such collateral certificates, and deliver the same (118) to the treasurer aforesaid as soon as same is received from Alfred Caldwell, the attorney for this company." Mr. Porter asked: "Suppose that he paid this debt, these liens, off himself, what was to be done then?" That after that had passed the words were added to the resolution: "and that should said deeds of trust be paid off by said Porter, this company will surrender the notes secured thereby to said Porter," after counsel for defendants having stated that the purpose for which they made the offer was to explain what Mr. Boren had been talking about to Mr. Stewart,

Mr. Stewart having testified that Mr. Boren told him in the middle of January that the company had assumed to pay off this indebtedness of John Porter on these liens, and had purchased Porter's stock; and counsel for defendants having further stated that they desired to show that the company had assumed to pay off these Silvers and Stewart debts, and that Mr. Boren had admitted to Stewart that the company, and not Boren and Mack, had agreed to pay these liens, whereupon the plaintiff's counsel having objected to the defendants being allowed to prove this offer, it is here assigned as error that the court sustained the said objection.

XI.

That the court sustained the objection of the plaintiff to the offer of the defendants to prove by the witness, G. B. Boren, that before the foregoing resolution was offered Mr. John Porter represented that the Stewart and Silver liens did not amount to over $9,000, and that that was the reason that the amount of the note mentioned in this resolution was fixed at $10,000, and that note was taken, and that the liens at that time amounted to $14,000.

XII.

(119, Counsel for the defendants having asked the witness, G. B. Boren, the following question:

"State whether or not the John Porter Company, before that meeting in January with Mr. Stewart, in 1892, had assumed to pay off these Stewart and Silver liens."

The question was objected to by plaintiff's counsel, and the objection was overruled by the court.

The witness answered: "They had."
Q. "State when and where."
A. "At the meeting of the directors, May 9th."
Q. "What year?"
A. "1891."

The COURT: "You cannot prove this. I will allow you to prove the simple fact that before that meeting of Mr. Boren, in January, with Mr. Stewart, in 1892, The John Porter Company had assumed to pay off these Stewart and Silver liens."

The defendants here assign as error the ruling and judgment of the court excluding the evidence showing when and where such agreement had been made by the John Porter Company.

XIII.

Upon the defendant excepting to the last mentioned ruling and judgment of the court, the court said: "Then I will exclude it all," and this last mentioned ruling and (120) judgment of the court is here assigned as error.

XIV.

The defendants having shown in evidence by John M. Mack, as a witness, that in December, 1891, he resided in Philadelphia, and that some considerable time before the consummation of the sale in the latter part of the year 1891, of 710 shares of stock of John Porter in The John Porter Company, defendants' counsel then asked the witness:

"If you saw Mr. Vance in relation to the stock in the John Porter Company, tell us what transpired?"

Which question was objected to bv plaintiff's counsel, and it is here assigned as error that the court sustained said objection.

XV.

Counsel for defendants thereupon offered to prove by John M. Mack, the witness on the stand, that along about the month of December, 1891, he had an interview with Mr. J. N. Vance, President of the Exchange Bank of Wheeling, in the City of Wheeling, in which Mr. Vance proposed to him to purchase the 710 shares of stock which were purchased afterwards, and that Mr. Mack informed Mr. Vance that he would not make any offer for that stock or have anything to do with the purchase of the stock if Mr. John Porter had anything to do with it; that he would only enter into negotiations in relation to the sale of it if it was the stock of the Exchange Bank, and he asked Mr. Vance if the stock was the stock of the bank and owned by it, and Mr. Vance replied that the bank did own it.

Whereupon counsel for plaintiff objected to the evidence offered by the defendants being permitted to be introduced.

The court sustained the objection, and the said ruling and judgment of the court is here assigned as error.

XVI.

Whereupon counsel for the defendants asked the wit- (121) ness, John M. Mack, as follows:

"State whether or not, before the sale of this stock by the Exchange Bank to you, the 710 shares, you had refused to have any dealings in relation to it with the bank unless they owned the stock, and had informed the president of the bank that you would have nothing to do with the stock if Mr. Porter had any interest in it, and that, prior to the interview of December 1st, 1891, and in the absence of Mr. Porter?"

Which question was objected to by counsel for plaintiff and the objection was sustained by the court, which ruling and judgment is assigned as error.

XVII.

That the declaration as amended in this case sets forth as a part of the contract made by the defendants, for breaches of which this suit was brought, that the defendants, John M. Mack and G. B. Boren, "undertook and agreed to and with the said plaintiff that an indebtedness of the plaintiff to the said John Porter Company on an open account, the amount of which was not then definitely known, should be cancelled, and that the said defendants would pay off the same and that the plaintiff should never be sued therefor, but was then and there free from the same," but no breach of the above quoted agreements or failure to perform the same is alleged in the declaration as amended, nor are damages claimed for any such breach.

In the suit of the John Porter Company, whose name was afterwards changed to the Mack Manufacturing Company, the court in Ohio, at Steubenville, gave judgment against John Porter for the amount of his indebtedness to (122) the John Porter Company on open account, being a sum of four hundred dollars, and also gave judgment for the sum of fourteen thousand three hundred and seventy-two dollars and twenty-seven hundredths, the amount of the Silver's and Stewart liens, aggregating fourteen thousand seven hundred and seventy-two dollars and twenty-seven hundredths, with interest. A credit of fifty-seven hundred dollars, as of February 21st, 1893, was made on said judgment, amounting to $14,772.27, and interest, and the court at Steubenville, Ohio, gave judgment against John Porter for $9,190.63, with interest from February 21st, 1893, until payment. On the last mentioned judgment, suit being brought in Hancock county, West Virginia, by the Mack Manufacturing Company, judgment was rendered July 2d, 1894, for $9,941.20, with interest from the date of the judgment till payment, said $9,941.20 being the aggregate of the $9,190.63 and interest thereon to July 2d, 1894.

The defendants assign as error that the said Circuit

Court of the United States rendered judgment against the defendants for the sum of $9,941 20
Interest from July 2d, 1894, to April 18th, 1895, 472 20
And costs, 30 20

$10,443 60

with interest from April 18th, 1895, until payment, and thus included in said judgment as aforesaid damages for breaches of agreements not alleged to have been broken in the declaration, and damages not demanded in said declaration, to-wit: the amount of said open account for $400 and interest thereon.

All of which is respectfully submitted,

JOHN M. MACK and
G. B. BOREN,
By CALDWELL & CALDWELL,
Their Attorneys.

(123) **BOND AND APPROVAL.**

Accepted and Approved in Open Court and Filed July 15th, 1895.

Know all men by these presents, that we, Joseph P. Mack, as principal, and G. B. Boren, as surety, are held and firmly bound unto John Porter in the full and just sum of fifteen thousand dollars to be paid to the said John Porter, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 15th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at a regular term of the United States Circuit Court for the District of West Virginia, in a suit depending in said court, between John Porter, plaintiff, and John M. Mack and G. B. Boren, defendants, a judgment was rendered against the said John M. Mack and G. B. Boren and the said John M. Mack and G. B. Boren having obtained a writ of error and supersedeas to reverse the judgment and filed a copy thereof in the clerk's office of said court, and having also obtained a citation citing and admonishing the plaintiff, John Porter, to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the day in the said citation mentioned.

Now, the condition of the above obligation is such, that if said John M. Mack and G. B. Boren shall prosecute their appeal to effect, and answer all damages and costs if

they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

G. B. BOREN, [Seal.]
JOS. P. MACK, [Seal.]

Sealed and delivered in presence of }

Approved by
J. J. JACKSON,
U. S. Dist. Judge, D. W. Va.

(124) **STIPULATION.**

Filed July 15, 1895, in Open Court.

IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF WEST VIRGINIA.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

STIPULATION IN SAID ACTION.

It is hereby stipulated and agreed by Joseph P. Mack and G. B. Boren that if, in any event, the defendants, John M. Mack and G. B. Boren, shall fail to prosecute their appeal in the above mentioned action to success or it shall become necessary to sue on the supersedeas bond this 15th day of July, 1895, filed in the clerk's office of said court, wherein the said G. B. Boren is principal, and the said Joseph P. Mack is surety, that service of summons in such suit on Caldwell & Caldwell, now counsel of record for the defendants, John M. Mack and G. B. Boren, shall be held and deemed personal service on the said Joseph P. Mack and G. B. Boren, principal and surety in and to said bond.

Witness our signatures and seals this 15th day of July, A. D. 1895.

JOS. P. MACK, [Seal.]
G. B. BOREN, [Seal.]

**ORDER ALLOWING WRIT, &c.**

(125) July 15th, 1895.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

John Porter
*vs.*
John M. Mack and G. B. Boren. } In Assumpsit.

For good cause shown to the court this 15th day of

July, 1895, so much of the order entered in this action at this term of court on the 18th day of April, 1895, as provides that: "Thereupon, it is considered by the court that the plaintiff, John Porter, recover from the defendants, John M. Mack and G. B. Boren, the sum of ten thousand four hundred and forty-three dollars and sixty cents, the damages assessed by the jury, as aforesaid, with interest thereon from this date until paid, and his costs about his suit in this behalf expended," is hereby set aside. But it appearing to the court that judgment should be this day reentered in favor of the plaintiff against the said defendants, it is, thereupon, now considered by the court that the plaintiff, John Porter, recover from the defendants, John M. Mack and G. B. Boren, the sum of ten thousand four hundred and forty-three dollars and sixty cents, the damages assessed by the jury in this action, with interest thereon from the 18th day of April, 1895, until paid, and his costs about his suit in this behalf expended.

The said defendants, John M. Mack and G. B. Boren, having filed an assignment of errors with the clerk of this court with their petition for a writ of error and supersedeas (126) to the said judgment this day rendered and entered, as above set forth in this order, an assignment of errors setting out separately and particularly each error asserted and intended to be urged, the said petitioners offered as surety upon a supersedeas bond Joseph P. Mack, a resident of Philadelphia county, in the State of Pennsylvania, with the defendant, G. B. Boren, as principal on such bond, the penalty in which bond was fixed by the court at fifteen thousand dollars, and the court having sworn and examined said surety as to his sufficiency, the said G. B. Boren and Joseph P. Mack entered into and filed such bond in the office of the clerk of this court, with a stipulation now also filed in and by which the said Joseph P. Mack and G. B. Boren agreed that if, in any event, the defendants fail to prosecute their appeal with success, or it shall become necessary to sue on such bond, that service of summons in such suit on Caldwell & Caldwell, now counsel of record for the defendants, John M. Mack and G. B. Boren, shall be held and decreed personal service on the said Joseph P. Mack and G. B. Boren, principal and surety in and to said bond, which the court accepted only on condition that the said stipulation should be filed; and, thereupon, the said bond conditioned according to law is approved by the court and the writ of error and supersedeas aforesaid is hereby allowed in open court by the same.

And, thereupon, it is ordered by the court that a transcript of the record and proceedings in the cause aforesaid,

together with all the things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Fourth *District*.

(127) **WRIT OF ERROR.**

UNITED STATES OF AMERICA, } *ss*:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of West Virginia—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Circuit Court, before you, or some of you, between John Porter, plaintiff below and defendant in error, and John M. Mack and G. B. Boren, defendants below and plaintiffs in error, a manifest error hath happened, to the great damage of the said John M. Mack and G. B. Boren as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond, on the 12th day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal of the Court.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 15th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

L. B. DELLICKER,
Clerk of the Circuit Court of the United States,
For the District of West Virginia.

Allowed by.

J. J. JACKSON,
District Judge of the United States, for the District of West Virginia.

**RETURN.**

This writ of error was served this 15th day of July, 1895, by the filing thereof in the office of the clerk of the Circuit Court of the United States for the District of West Virginia, at Wheeling, and leaving on file in said office for the defendant in error, John Porter, a duly certified copy thereof, this 15th day of July, 1895. The record of the action herein mentioned remains in said office.

L. B. DELLICKER,
Clerk of the Circuit Court of the United States for the District of West Virginia.

Served the within writ of error upon John Porter therein named by delivering a true copy thereof to him in person in Hancock county, in the State and District of West Virginia, on the 5th day of August, A. D. 1895.

Witness my hand this 6th day of August, 1895.

A. G. GARDEN,
U. S. Marshal,
Per J. C. McMAHON,
Deputy U. S. Marshal.

On this sixth day of August, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared Joseph C. McMahon before me, the subscriber, James W. Ewing, a commissioner of the Circuit Court of the United States for the District of West Virginia, and makes oath *the* he delivered a true copy of the within writ of error to John Porter, at his residence in Hancock county, in the State and District of West Virginia, on the fifth day of August, A. D. 1895.

J. C. McMAHON.

Sworn to and subscribed the six day of August, A. D. 1895, before me in the City of Wheeling, in the county of Ohio, and State and District of West Virginia.

JAS. W. EWING, [Seal.]
Commissioner of the Circuit Court of the United States for Dist. of West Virginia.

Comr's costs, 25c.

Filed in the office of the clerk of the Circuit Court of

the United States for the District of West Virginia, July 15, 1895.

L. B. DELLICKER,
Clerk of the Circuit Court of the United States
for the District of W. Va.

(128) **CITATION.**

UNITED STATES OF AMERICA } *ss:*

The President of the United States to John Porter—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the 12th day of August next, pursuant to a writ of error and supersedeas filed in the Circuit Court of the United States for the District of West Virginia, wherein John M. Mack and G. B. Boren are plaintiff's in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John J. Jackson, District Judge of the United States for the District of West Virginia, sitting and presiding in the Circuit Court of the United States for the District of West Virginia, this 15th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN J. JACKSON.

On this sixth day of August, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared Joseph C. McMahon before me, the subscriber, James W. Ewing, a commissioner of the Circuit Court of the United States for the District of West Virginia, and makes oath *the* he delivered a true copy of the within citation to John Porter, at his residence in Hancock county, in the State and District of West Virginia, on the fifth day of August, A. D. 1895.

J. C. McMAHON.

Sworn to and subscribed the sixth day of August, A. D. 1895, before me in the city of Wheeling, in the county of Ohio, and State and District of West Virginia.

JAS. W. EWING, [Seal.]
United States Commissioner of Circuit Court for
the District of West Virginia.

Com'r costs, 25c.

Served the within citation upon John Porter therein named by delivering a true copy thereof to him in person in Hancock county, in the State and District of West Virginia, on the 5th day of August, A. D. 1895.

Witness my hand this this 6th day of August, 1895.

A. D. GARDEN,
U. S. Marshal.
Per J. C. McMAHON,
Deputy U. S. Marshal.

## ORDER RELATING TO THE TRANSMISSION OF TRANSCRIPT TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

(129)

And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

Test:

L. B. DELLICKER,
Clerk.

## CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
State and District of West Virginia. } To-wit:

I, L. B. Dellicker, Clerk of the Circuit Court of the United States for the District of West Virginia, do hereby certify that the foregoing is a full and true transcript from the record and judicial proceedings of the said court, and contains the record and proceedings in a certain action at law in assumpsit lately depending in the said court between John Porter, plaintiff, and John M. Mack and G. B. Boren, defendants, with all things concerning the same, as fully and wholly as they exist among the record and proceedings of the court aforesaid, together with the original writ of error and citation issued and served in said action.

{ Seal of the Court. } Witness my signature as such clerk and the seal of said court, at Wheeling this 6th day of August, A. D. 1895.

L. B. DELLICKER,
Clerk as aforesaid.

## PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

No. 145.

| | |
|---|---|
| John M. Mack and G. B. Boren, Plaintiffs in Error, *vs.* John Porter, Defendant in Error. | Error to the Circuit Court of the United States for the District of West Virginia. |

August 10, 1895, transcript of the record filed in the United States Circuit Court of Appeals.

November term, 1895, to-wit: November 14, 1895, the cause came on to be heard on the transcript of the record, and was argued by counsel and submitted.

February term, 1896, to-wit: February 4, 1896, the court announced and filed its opinion, which is as follows, to-wit:

## OPINION.

## UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 145.

John M. Mack et al., Plaintiffs in Error, *vs.* John Porter, Defendant in Error. } Error to the Circuit Court of the United States for the District of West Virginia.

[Argued November 14, 1895. Decided February 4, 1896.]

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

G. B. CALDWELL, of CALDWELL & CALDWELL, and CHAS. V. MEREDITH, for Plaintiffs in Error, and W. P. HUBBARD, for Defendant in Error. (HENRY M. RUSSELL on the Brief).

BRAWLEY, District Judge:

This case is before us on a writ of error to the Circuit Court of the United States for the District of West Virginia, and grows out of exceptions taken and allowed at the trial wherein John Porter, the defendant in error, was plaintiff, and recovered a verdict against John M. Mack and G. B. Boren in an action of assumpsit on a special oral contract originally brought in the Circuit Court of Hancock county, West Virginia, and removed into the United States Court on the ground of diversity of citizenship.

The record discloses eighteen exceptions, thirteen of which relate to the rejection and exclusion of testimony, five to the allowance of amendments to the declaration at the time of the trial, and to the refusal to grant a continuance on account thereof.

In the year 1891 John Porter held a controlling interest in the stock of a corporation engaged in the manufacture of brick in Hancock county, West Virginia, known as the John Porter Company, the name of which by proceed

ings subsequent to the transactions hereinafter mentioned was changed to the Mack Company. He had sold and conveyed to said corporation certain real estate upon which there were two liens, that will be hereafter designated as the Stewart lien and the Silvers lien, the amount due thereon being about fourteen thousand dollars, for which he was liable, and to secure said company against loss by reason of said liens he had given his note, and pledged stock of the John Porter Company to the amount of fifteen thousand dollars.

He was indebted to G. B. Boren, and had pledged fifteen thousand dollars of the stock of said company as security, also to the Exchange Bank of Wheeling, which held as security seventy-one thousand dollars of the same stock. He had, likewise, before that time, become indebted to John M. Mack, who had held some of the same stock as collateral to secure him as endorser, but this stock had been sold prior to the events now to be related, leaving an indebtedness of about four thousand dollars, and some hard feelings.

He was likewise indebted to the John Porter Company on an open account then unliquidated, but subsequently ascertained to amount to about four hundred dollars.

The stock held by the Exchange Bank had been transferred to one Jones, its cashier, as trustee, and stood in his name. .

The defendant, Mack, had made some effort, without result, to purchase the stock from Vance, the president of the bank, who was friendly to Porter, and unwilling to sell without his consent, and as Porter had an equity of redemption, the bank had given to James M. Porter, a kinsman of the plaintiff, a power of attorney to negotiate its sale.

Thus matters stood when, by an appoinment arranged by Vance, the president of the bank, an interview was had at a hotel in Steubenville, Ohio, on December 1st, 1891, between John Porter, James M. Porter, Vance, Boren and De Haven Lance, who represented Mack. It was at that interview that the contract which gave birth to this controversy is alleged to have been made.

The accounts given of this interview and contract are hazy and conflicting, but as it has been passed upon by a jury and a verdict in favor the plaintiff, Porter, has been sustained by the trial judge, it is beyond the province of this court to open up any question as to the merits of the respective contentions. The verdict of the jury settles the point that a contract was made, as alleged by the plaintiff in the action below, and, unless some reversible error is dis-

covered in the proceedings leading to it, such verdict must stand.

On the part of John Porter it is contended that he was unwilling to part with his interest in the stock held by the bank and in the stock held by Boren unless he could sell all, and close out at the same time all interest in the John Porter Company, and be freed from all liability connected with it, and that the result of the negotiations on that day was an agreement that the bank should sell to Mack the stock held by it at a price which would give him forty-one thousand dollars; that Boren should take the stock held by him at sixty-five cents on the dollar; that the stock pledged to the John Porter Company should become the property of that company, and that he should be relieved of all liability on account of the Stewart and Silvers liens and of the indebtedness against him on the books of that company, and that he should also be relieved of the indebtedness growing out of the previous transactions with Mack.

On the part of the defendants, Mack and Boren, it is contended that the negotiations had no other object and had no other result than an agreement that Boren should take the stock held by him at sixty-five cents on the dollar, and that Mack should purchase the stock held by the bank at a figure to be settled between the bank and himself, the bank only stipulating with Porter that he should receive forty-one thousand dollars.

At this date the Stewart and Silvers liens were not due. Subsequently when they fell due they were paid by the Mack Company, which, in January, 1893, brought suit against John Porter, and recovered judgment against him for the sum of $14,772.27, this being the amount of the indebtedness on account of those liens and the open account. A credit of $5,700 as of February 21st, 1893, being the proceeds of the sale of the pledged stock, was made on said judgment and execution issued against the property of John Porter for the difference, which, with costs, amounts to $10,443.60.

It is to recover this sum that this suit is brought against Mack and Boren upon the contract herein above referred to, and the case came on for trial before Judge Jackson and a jury on the 15th of April, 1895, resulting in a verdict for the plaintiff for the amount claimed.

The exceptions taken upon such trial are now to be considered, those relating to the exclusion of testimony, each in its order; those relating to the allowance of amendments during the progress of the trial being considered together. And to a proper apprehension of the bearing of

the testimony it may be well to state that the question submitted to the jury, and the only question, was whether a contract had been made at Steubenville, Ohio, on the 1st of December, 1891, as maintained by the plaintiff and denied by the defendants.

The first exception assigned as error relates to the exclusion of certain testimony respecting the preparation of a certain paper which was offered by the defendant and admitted in evidence.

This paper is an agreement bearing date and executed on December 2nd, 1891, between the Exchange Bank of Wheeling and John M. Mack, whereby the said bank agreed to sell to Mack the 710 shares of stock of the John Porter Company standing in the name of John J. Jones, trustee, and Jones, the trustee, at the foot of the agreement, makes a declaration that he holds the stock for the use and benefit of the Exchange Bank of Wheeling.

The court excluded testimony which was offered to show that the original draft of this agreement was prepared by the attorney of the bank, and that some additions were made by the attorney for Mack.

We fail to see any possible relevancy to the real question at issue which this rejected testimony could have. When Porter consented to the sale and transfer of the stock and received from the bank the purchase money therefor, the details of the transfer by the bank to another purchaser, and the terms of payment were of no concern to him. In so far as this testimony tended to show that Mack was dealing with the bank alone, the defendant has had the benefit of it with all the inferences that could possibly and legally flow from it by the admission of the paper itself, which, on its face, purports to be an agreement between him and the bank alone. It was of absolutely no consequence whether said agreement was prepared by the attorney for the bank or the attorney for Mack, by either or neither, or by both conjointly. There is no error in the rejection of the proffered testimony.

The 2nd, 3rd and 4th exceptions refer to the amendments and will be considered hereafter.

The 5th exception is to the ruling out of the question: "At whose solicitation?" asked of the witness Lance by the defendant's counsel when he was giving an account of some negotiations for the purchase of the stock from Vance, anterior to the 1st of December. Whether Lance had made an effort to buy, or whether Vance had made an effort to sell prior to that date, can throw no light upon what took place at that meeting, as to whether the contract alleged was then entered into or not. If offered for the pur-

pose of showing that Lance would have no dealings with Porter, it is negatived by the fact that he did have dealings with him, that is to say, that he did go to the meeting on December 1st at Steubenville for the purpose of some negotiation respecting this stock. Whether those negotiations eventuated in the contract declared on, is another question.

There is no error in the rejection of the question.

The 6th, 7th, 8th and 9th exceptions are to the refusal to admit testimony concerning certain offers made by Mack to Porter in regard to a transaction between them long since closed, growing out of the sale of some stock pledged by Porter to secure a debt for which Mack was an endorser, and on account of which Porter had, or thought he had, a grievance. It is not pretended that this transaction had any relation to the negotiations of December 1st or could throw any light upon the agreement alleged as of that date.

The utmost effect of that kind of testimony would be to show that Mack was a benevolent man, and not a harsh man, and that Porter's alleged grievance was imaginary. These were not questions which were at issue. The matter in dispute was whether a contract was made on December 1st. The fundamental principles of the law of evidence confine testimony to the point at issue, and to facts from which some reasonable presumption or inference affecting the matter in dispute may be drawn. If testimony had been offered by the plaintiff, the tendency of which was to create a prejudice against the defendant by showing that in some other transaction and at some other time the defendant had done the plaintiff some injury, the proper course would have been to object to that testimony. The record here discloses that whatever was said by Porter in derogation of Mack was brought out on the cross-examination by the counsel for the defendant himself.

In excluding the testimony which tended to draw away the minds of the jury from the real question at issue, no error was committed.

The 10th, 12th and 13th exceptions relate to the exclusion of testimony offered in explanation of a conversation between Stewart and Boren, one of the defendants, wherein Stewart relates that Boren had said that "we" were going to pay the liens. To meet the argument that plaintiff's counsel might be expected to make that in using the pronoun "we," Boren meant Mack and himself, defendants proved by Boren that he meant "The John Porter Company," that the meeting with Stewart was altogether for the purpose of attending to the business of the company

and that he had no affairs of his own in connection with Stewart.

Counsel for the defendants then offered in evidence the proceedings of the Board of Directors on May 9, 1891, showing that at that time it was agreed between the company and John Porter that the company would assume and pay the Stewart and Silvers' liens, and that Porter had transferred to the company for its indemnification 150 shares of the stock of the company.

A copy of the minutes of this meeting was put in evidence without objection. An offer was then made to prove something that was said by Porter during the meeting for the purpose of explaining the conversation between Boren and Stewart. This was objected to, and the Court sustained the objection.

The witness was then asked some further questions concerning this meeting, whereupon the Court, of its own motion, said: "You cannot prove this. I will allow you to prove the simple fact, that before that meeting of Mr. Boren in January, 1892, with Mr. Stewart, the John Porter Company had assumed to pay off these Stewart and Silvers liens.

Upon an exception being taken to this ruling, the Court said: "Then I will exclude it all."

The record does not show whether the testimony, already in without objection, was excluded or not, and it does not appear that the jury was directed to disregard it. Assuming that it was, to what extent did such exclusion work injury to the defendants?

The fact that the John Porter Company had agreed in May to assume the payment of these liens, and had taken the note and stock of John Porter as indemnity, is not inconsistent with the claim that a contract was made, in December following that Mack and Boren would relieve Porter from any further liability in respect to said liens. That contention was the main issue that was being tried. Boren had already sworn that he referred to this obligation of the company to pay the liens in his interview with Stewart, and, when the court allowed him to prove that the John Porter Company had, prior to the interview with Stewart, assumed the payment of these liens, that was all that could properly be asked. It was the apparently needless iteration of that proof that led the court to the exclusion of any further testimony upon that point. We are of opinion that the testimony admitted by the court allowed a sufficient explanation of Boren's remark to Stewart, and do not find in these exceptions grounds for reversal.

The 11th exception grows out of the refusal of the

court to allow testimony that Porter, in May, 1891, had represented that the Stewart and Silvers liens did not amount to more than $9,000. No proof was offered to show that in December following, at the time when the alleged contract was made, the defendants were ignorant of the true amount of the liens; and that they were misled by those representations into the making of the contract, which otherwise they would not have entered into. If that was the contention, proof of a misstatement would be relevant, otherwise not.

The 14th exception relates to a conversation at a meeting on January 11th, 1892, whereat James M. Porter claims that Boren had made certain admissions. Boren denies that he had made such admissions; stated that the object he had in view in going to that meeting was to settle a personal account with John Porter, and that upon Porter's refusal he threatened to sue him. Plaintiff's counsel objected to witness repeating the threat, and the court rebuked the witness, and sustained the objection to so much of the answer as is in these words: "Unless you settle my account, I will sue you before the sun goes down."

This is the ground of an exception. There does not appear to be any merit in this exception.

The 15th, 16th and 17th exceptions relate to the exclusion of conversations between the defendant, Mack, and Vance, the president of the bank, some time in the fall of 1891, prior to meeting at Steubenville, in which Mack had said that he would not make any offer for the stock if Porter had anything to do with it; that he would only buy it if it belonged to the bank, and that he would not have any negotiations with Porter for the stock. Porter was not present at any of these conversations.

As it is a matter of common knowledge that men frequently change their minds, and as it is in evidence that Lance, the agent of Mack, did enter into negotiations of some kind with Porter at the end of December at Steubenville, with reference to this very stock, it is difficult to see what bearing these antecedent conversations have upon the question at issue. If there was a contract made at Steubenville, all previous negotiations are merged in that contract, except in so far as they may tend to make clear any ambiguity as to the terms. It is not claimed by the defendants that there is such ambiguity. They deny that any contract at all was made at that meeting. If that is so, then the conversations are irrelevant. It cannot be seriously contended that a man can escape the performance of a contract by proof that some time before it was alleged to have been made he had declared that he would not make it.

This testimony, and some other testimony the rejection of which we have already considered and determined to have been properly excluded because of its irrelevancy, is claimed to have been properly admissible as part of the *res gestae*.

The object to which it was addressed was not to explain or elucidate the contract which was in issue, but to show that no contract was made at all. They endeavor to show that the purchase of the 710 shares of stock was a simple transaction between Mack and the bank. If that is true, it is a good defence to this action, but, like all other defences, it must be established by competent testimony. Upon such an issue it can scarcely be pretended that a declaration, not under oath, of one of the parties to that transaction can affect the rights of any party not present when such declaration is made. It is elemental that such declarations are inadmissible.

Declarations are not admissible to prove a past occurrence. An isolated conversation or an isolated act done, or a statement of intention respecting it is no proof of the fact itself. In so far as this kind of testimony tended to show that the defendant bought from the bank, he had the benefit of it in the evidence which was admitted in the written agreement showing on its face that the bank sold the stock to Mack.

This action was for the enforcement of a contract alleged to have been made at Steubenville, and witnesses competent to prove it testified to that contract. Here is a single act well defined as to time. To be a part of the *res gestae* of that act the declarations must have been made at the time of the act done, and calculated to explain it and unfold its true nature and quality. As such they are admissible as original evidence, because they are regarded as part of the principal act, explaining whatever may be equivocal in its character; they grow out of the act itself. and serve to illustrate it.

There may be cases where the transaction is of a continuous nature, where the limitations as to time would not be so restricted, and admissions of declarations, made after the event, would be governed by those principles of law, which the particular case might require.

In the case under consideration the declarations sought to be introduced related to facts detached from the principal issue, did not grow out of it, or serve to illustrate it, or constitute a part of it. To to admitted as evidence other principles of law must be invoked than that they are a part of the *res gestae*.

We know of none that would allow the admission of such testimony, and its exclusion, therefore, is not error.

We come now to the consideration of exceptions (2, 3 and 4) relating to the allowance of amendments pending the trial, and the refusal of the continuance asked on account thereof.

The purpose of the amendments was to make the declaration conform to the proof. The first one alleged that it was a part of the agreement at Steubenville that the defendant, Boren, would take the stock pledged to him at sixty-five cents on the dollar. As there was no dispute on that point, and as the defendant, Boren, did take the stock and credit Porter with that amount, no breach being charged or claim made on account thereof, the amendment was properly allowed, and so as to the second amendment, which allowed the plaintiff to state in his declaration that it was also agreed that the indebtedness of Porter to the John Porter Company on the open account should be cancelled.

These amendments did not, nor did either of them, state a separate cause of action, nor claim damages for separate breaches. It was claimed that they were all a part of the same transaction. The contract at Steubenville was a single contract, containing various provisions, none of which constituted separate causes of action upon which separate actions could be brought; the amendments did not bring in any foreign substantive causes of action, and, as they related and formed part of the original cause of action, they became properly a part of the declaration charging a breach of the single contract, which was the subject of the litigation.

In matters of this nature, the courts of the United States are governed by the laws of the State where the litigation is had, and the Code of West Virginia, Section 12 of Chapter 125 provides that "the plaintiff may of right amend his declaration or bill at any time before the appearance of the defendant, or after such appearance, it substantial, justice will be promoted thereby." But if such amendment be made after the appearance of the defendant the court may impose such terms upon the plaintiff as to a continuance of the cause and the payment of the cost of such continuance as it may deem just."

There is nothing in the record to show that the allowance of the amendments operated to the disadvantage of the defendants, that it was a surprise, and that a continuance was necessary in order that additional testimony could be provided to meet any new aspect of the case made by the amendments. In fact, as all of the witnesses who were present at the time when the alleged contract was made, or who could testify as to the terms of it, were al-

ready before the court, and had already been examined as to their knowledge of the matters to which the amendments related, no case is made which takes it out of the general rule that the granting or refusing of continuance is within the dircretion of the trial judge, not reviewable in this court.

The last exception assigns as error the including in the verdict of the amount of the open account, $400, and interest thereon.

This suit was upon a contract which provided that the defendants should pay the amount of liens upon the property of the company for which the plaintiff was liable and the open account. Judgment had been recovered against the plaintiffs by the company, which judgment included both liens and open account, and the cause of action in this case was the breach of the contract which consisted in the procuring of that judgment. If the plaintiff was entitled to recover at all, he was entitled to recover the whole amount of that judgment.

Our opinion upon the whole case is that the judgment of the court below should be *affirmed, and it is so ordered and adjudged.*

At the same term, to-wit: February 8, 1896, the court here made and entered the following judgment, to-wit:

## JUDGMENT.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 145.

| | |
|---|---|
| John M. Mack and G. B. Boren, Plaintiffs in Error, *vs.* John Porter, Defendant in Error. | In Error to the Circuit Court of the United States for the District of West Virginia. |

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of West Virginia, and was argued by counsel.

In consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Cir-

cuit Court, in this cause, be, and the same is hereby affirmed, with interest and costs; interest until paid at the same rate per annum that similar judgments bear in the courts of the State of West Virginia.

It is further ordered that the mandate of this court issue after the expiration of twenty days from the date hereof.

CHARLES H. SIMONTON,
Circuit Judge.

February 8, 1896.

## CLERK'S CERTIFICATE.

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true copy of the entire record in the therein entitled cause, as the same remains upon the files and records of the said Circuit Court of Appeals.

Seal of Court.

In Testimony Whereof, I hereto set my hand and affix the seal of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 18th day of February, A. D. 1896.

HENRY T. MELONEY,
Clerk U. S. Ct. Ct. Appeals, 4th Ct.